UNITED STATES REPORTS

VOLUME 476

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1985

APRIL 29 THROUGH JUNE 17, 1986

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

HENRY C. LIND

REPORTER OF DECISIONS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1989

ERRATA

475 U. S. LXVII, column 2, lines 35, 36: "471 U. S. 524" should be "471 U. S. 539".

475 U. S. 11, line 9: "471 U. S. 524" should be "471 U. S. 539".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.
SANDRA DAY O'CONNOR, Associate Justice.

OFFICERS OF THE COURT

EDWIN MEESE III, Attorney General.
CHARLES FRIED, Solicitor General.
JOSEPH F. SPANIOL, Jr., Clerk.
HENRY C. LIND, Reporter of Decisions.
ALFRED WONG, Marshal.
STEPHEN G. MARGETON, Librarian.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective *nunc pro tunc* October 1, 1981, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, LEWIS F. POWELL, JR., Associate Justice.

October 5, 1981.

Pursuant to the provisions of Title 28, United States Code, Section 42, *it is ordered* that the Chief Justice be, and he hereby is, assigned to the Federal Circuit as Circuit Justice, effective October 1, 1982.

October 12, 1982.

(For next previous allotment, see 423 U. S., p. VI.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1985

SKIPPER *v.* SOUTH CAROLINA

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

No. 84–6859. Argued February 24, 1986—Decided April 29, 1986

Petitioner was convicted of capital murder and rape after a jury trial in a South Carolina court. The State sought the death penalty, and a separate sentencing hearing was held before the trial jury. Following the State's introduction of evidence in aggravation of the offense, petitioner presented as mitigating evidence his own testimony and that of his former wife, his mother, his sister, and his grandmother. He then sought to introduce testimony of two jailers and a "regular visitor" to the effect that he had "made a good adjustment" during the 7½ months he had spent in jail between his arrest and trial. The trial court ruled such evidence irrelevant and inadmissible, and petitioner was sentenced to death. The South Carolina Supreme Court affirmed the death sentence, rejecting petitioner's contention that the trial court had committed constitutional error in excluding the testimony of the jailers and visitor.

Held: The trial court's exclusion from the sentencing hearing of the testimony of the jailers and the visitor denied petitioner his right to place before the sentencing jury all relevant evidence in mitigation of punishment. *Lockett* v. *Ohio*, 438 U. S. 586; *Eddings* v. *Oklahoma*, 455 U. S. 104. Pp. 4–9.

(a) The record does not support the State's contention that the trial court's ruling was no more than an application of rules restricting the use of lay opinion testimony. Pp. 5–6.

(b) Nor is there any support in the record for the State's contention that the trial court's ruling was not improper because it did not prevent petitioner from introducing evidence of past good conduct in jail, but only foreclosed the introduction of "irrelevant" evidence of his *future* adaptability to prison life. Pp. 6–7.

(c) And, contrary to the State's suggestion, it is implausible, on the facts, to characterize the excluded evidence as cumulative and its exclusion as harmless error. Pp. 7–9.

285 S. C. 42, 328 S. E. 2d 58, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. POWELL, J., filed an opinion concurring in the judgment, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 9.

David I. Bruck, by appointment of the Court, 474 U. S. 942, argued the cause and filed briefs for petitioner.

Harold M. Coombs, Jr., Assistant Attorney General of South Carolina, argued the cause for respondent. With him on the brief was *T. Travis Medlock*, Attorney General.*

JUSTICE WHITE delivered the opinion of the Court.

Petitioner Ronald Skipper was convicted in a South Carolina trial court of capital murder and rape. The State sought the death penalty, and a separate sentencing hearing was held before the trial jury under S. C. Code § 16–3–20 (1985), which provides for a bifurcated trial and jury sentencing in capital cases. Following introduction by the State of evidence in aggravation of the offense (principally evidence of petitioner's history of sexually assaultive behavior), petitioner presented as mitigating evidence his own testimony and that of his former wife, his mother, his sister, and his grandmother. This testimony, for the most part, concerned

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*A brief of *amici curiae* was filed for the State of Alabama et al. by *David Crump*, *Charles A. Graddick*, Attorney General of Alabama, *Steve Clark*, Attorney General of Arkansas, *James J. Kelly*, Chief State's Attorney of Connecticut, *Jim Smith*, Attorney General of Florida, *James T. Jones*, Attorney General of Idaho, *William L. Webster*, Attorney General of Missouri, *LeRoy S. Zimmerman*, Attorney General of Pennsylvania, *Gerald L. Baliles*, Attorney General of Virginia, *Kenneth O. Eikenberry*, Attorney General of Washington, and *Archie G. McClintock*, Attorney General of Wyoming.

the difficult circumstances of his upbringing. Petitioner and his former wife, however, both testified briefly that petitioner had conducted himself well during the 7½ months he spent in jail between his arrest and trial. Petitioner also testified that during a prior period of incarceration he had earned the equivalent of a high school diploma and that, if sentenced to life imprisonment rather than to death, he would behave himself in prison and would attempt to work so that he could contribute money to the support of his family.

Petitioner also sought to introduce testimony of two jailers and one "regular visitor" to the jail to the effect that petitioner had "made a good adjustment" during his time spent in jail. The trial court, however, ruled that under the South Carolina Supreme Court's decision in *State* v. *Koon*, 278 S. C. 528, 298 S. E. 2d 769 (1982) *(Koon I)*, such evidence would be irrelevant and hence inadmissible. The decision in *Koon I*, the judge stated, stood for the rule that "whether [petitioner] can adjust or not adjust" was "not an issue in this case." App. 11.

After hearing closing arguments—during the course of which the prosecutor contended that petitioner would pose disciplinary problems if sentenced to prison and would likely rape other prisoners, *id.*, at 13–14—the jury sentenced petitioner to death. On appeal, petitioner contended that the trial court had committed constitutional error in excluding the testimony of the jailers and the visitor: the testimony of these witnesses, petitioner argued, would have constituted relevant mitigating evidence, and exclusion of such evidence was improper under this Court's decisions in *Lockett* v. *Ohio*, 438 U. S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982). The Supreme Court of South Carolina rejected petitioner's contention, stating:

> "The trial judge properly refused to admit evidence of [petitioner's] *future* adaptability to prison life. *State* v. *Koon, supra.* However, evidence of his past adaptability was admitted through testimony of his former wife,

> his mother and his own testimony. This contention is without merit." 285 S. C. 42, 48, 328 S. E. 2d 58, 61–62 (1985).

We granted certiorari, 474 U. S. 900 (1985), to consider petitioner's claim that the South Carolina Supreme Court's decision is inconsistent with this Court's decisions in *Lockett* and *Eddings*, and we now reverse.

There is no disputing that this Court's decision in *Eddings* requires that in capital cases "'the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Eddings, supra,* at 110 (quoting *Lockett, supra,* at 604 (plurality opinion of BURGER, C. J.)) (emphasis in original). Equally clear is the corollary rule that the sentencer may not refuse to consider or be precluded from considering "any relevant mitigating evidence." 455 U. S., at 114. These rules are now well established, and the State does not question them.

Accordingly, the only question before us is whether the exclusion from the sentencing hearing of the testimony petitioner proffered regarding his good behavior during the over seven months he spent in jail awaiting trial deprived petitioner of his right to place before the sentencer relevant evidence in mitigation of punishment. It can hardly be disputed that it did. The State does not contest that the witnesses petitioner attempted to place on the stand would have testified that petitioner had been a well-behaved and well-adjusted prisoner, nor does the State dispute that the jury could have drawn favorable inferences from this testimony regarding petitioner's character and his probable future conduct if sentenced to life in prison. Although it is true that any such inferences would not relate specifically to petitioner's culpability for the crime he committed, see *Koon I, supra,* at 536, 298 S. E. 2d, at 774, there is no question but that such inferences would be "mitigating" in the sense that they might serve "as a basis for a sentence less than death." *Lockett, supra,* at 604. Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing: "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose." *Jurek* v. *Texas,* 428 U. S. 262, 275 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.). The Court has therefore held that evidence that a defendant would in the future pose a danger to the community if he were not executed may be treated as establishing an "aggravating factor" for purposes of capital sentencing, *Jurek* v. *Texas, supra;* see also *Barefoot* v. *Estelle,* 463 U. S. 880 (1983). Likewise, evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating.[1] Under *Eddings,* such evidence may not be excluded from the sentencer's consideration.

The State advances several arguments as to why the exclusion of petitioner's proffered evidence was, nonetheless, not erroneous. First, the State contends that the trial court ruled only that petitioner's witnesses could not offer incompetent lay opinion testimony regarding petitioner's ability to adjust to prison life in the future. *Eddings,* the State argues, does not displace reasonable state-law rules regarding the competency of testimony. The record does not, however, support the State's contention that the trial court's ruling was no more than an evenhanded application of rules restricting the use of opinion testimony. It is true that petitioner's request for a ruling on the admissibility of the testimony of the two jailers and the "regular visitor" was immediately preceded by an attempt to introduce his former wife's opinion (ruled inadmissible by the trial judge, App. 10) regarding his prospects for adjustment to prison life. In seeking a ruling on the testimony of the three witnesses at issue here, however, petitioner made it clear that he expected them "to testify that [petitioner] *has made* a good adjustment" to jail. *Id.*, at 11 (emphasis added). Defense counsel was not offering opinion testimony regarding future events. Under these circumstances, any ruling premised on the assumption that petitioner planned to present incompetent opinion testimony would have been—as the State conceded at oral argument—a "mistake." Such a misunderstanding could by no means justify the exclusion of nonopinion evidence bearing on the defendant's ability to adjust to prison life.

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[1] The relevance of evidence of probable future conduct in prison as a factor in aggravation or mitigation of an offense is underscored in this particular case by the prosecutor's closing argument, which urged the jury to return a sentence of death in part because petitioner could not be trusted to behave if he were simply returned to prison. Where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, it is not only the rule of *Lockett* and *Eddings* that requires that the defendant be afforded an opportunity to introduce evidence on this point; it is also the elemental due process requirement that a defendant not be sentenced to death "on the basis of information which he had no opportunity to deny or explain." *Gardner* v. *Florida,* 430 U. S. 349, 362 (1977).

Second, the State echoes the South Carolina Supreme Court in arguing that the trial court's ruling was not improper because it did not prevent petitioner from introducing evidence of past good conduct in jail for purposes of establishing his good character, but only foreclosed the introduction of "irrelevant" evidence of his *future* adaptability to prison life. There is no clear support for this contention in the record of this case, as the trial court did not explicitly rely on any such distinction and appears to have excluded petitioner's evidence of good conduct for any purpose whatsoever. The State's proposed distinction between use of evidence of past good conduct to prove good character and use of the same evidence to establish future good conduct in prison seems to be drawn from the decision of the South Carolina Supreme Court in another case altogether, *State* v. *Koon*, 285 S. C. 1, 328 S. E. 2d 625 *(Koon II)*, cert. denied, 471 U. S. 1036 (1985). There, the court stated that although "future adaptability to prison [is] irrelevant evidence because it does not bear on a defendant's character, prior record, or the circumstances of his offense[,] . . . [p]ast behavior in prison does bear on a defendant's character and, therefore, is relevant." 285 S. C., at 3, 328 S. E. 2d, at 626. This distinction is elusive. As we have explained above, a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination.[2] Accordingly, the precise meaning and practical significance of the decision in *Koon II* and of the State's argument is difficult to assess. Assuming, however, that the rule would in any case have the effect of precluding the defendant from introducing otherwise admissible evidence for the explicit purpose of convincing the jury that he should be spared the death penalty because he would pose no undue danger to his jailers or fellow prisoners and could lead a useful life behind bars if sentenced to life imprisonment, the rule would not pass muster under *Eddings*. Since the trial court's ruling in this case—whether or not it can credibly be said to be consistent with *Koon II*—at least had this effect, it cannot stand under *Eddings*.

Finally, the State seems to suggest that exclusion of the proffered testimony was proper because the testimony was merely cumulative of the testimony of petitioner and his former wife that petitioner's behavior in jail awaiting trial was satisfactory, and of petitioner's testimony that, if sentenced to prison rather than to death, he would attempt to use his time productively and would not cause trouble. We think, however, that characterizing the excluded evidence as cumulative and its exclusion as harmless is implausible on the facts before us. The evidence petitioner was allowed to present on the issue of his conduct in jail was the sort of evidence that a jury naturally would tend to discount as self-serving. The testimony of more disinterested witnesses—and, in particular, of jailers who would have had no particular reason to be favorably predisposed toward one of their charges—would quite naturally be given much greater weight by the jury. Nor can we confidently conclude that credible evidence that petitioner was a good prisoner would have had no effect upon the jury's deliberations. The prosecutor himself, in closing argument, made much of the dangers petitioner would pose if sentenced to prison, and went so far as to assert that petitioner could be expected to rape other inmates. Under these circumstances, it appears reasonably likely that the exclusion of evidence bearing upon petitioner's behavior in jail (and hence, upon his likely future behavior in prison) may have affected the jury's decision to impose the death sentence. Thus, under any standard, the exclusion of the evidence was sufficiently prejudicial to constitute reversible error.

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[2] We do not hold that all facets of the defendant's ability to adjust to prison life must be treated as relevant and potentially mitigating. For example, we have no quarrel with the statement of the Supreme Court of South Carolina that "how often [the defendant] will take a shower" is irrelevant to the sentencing determination. *State* v. *Plath,* 281 S. C. 1, 15, 313 S. E. 2d 619, 627, cert. denied, 467 U. S. 1265 (1984). In the case before us, there is no credible suggestion that petitioner sought to introduce evidence of his personal hygiene practices. Rather, petitioner apparently attempted to introduce evidence suggesting that he had been a well-behaved and disciplined prisoner. Such evidence of adjustability to life in prison unquestionably goes to a feature of the defendant's character that is highly relevant to a jury's sentencing determination.

The exclusion by the state trial court of relevant mitigating evidence impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender. The resulting death sentence cannot stand, although the State is of course not precluded from again seeking to impose the death sentence, provided that it does so through a new sentencing hearing at which petitioner is permitted to present any and all relevant mitigating evidence that is available. *Eddings*, 455 U. S., at 117. The judgment of the Supreme Court of South Carolina is therefore reversed insofar as it affirms the death sentence, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE POWELL, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, concurring in the judgment.

Although I agree that petitioner's death sentence must be vacated, that result is not required by our decisions in *Lockett* v. *Ohio,* 438 U. S. 586 (1978), and *Eddings* v. *Oklahoma,* 455 U. S. 104 (1982). I would reverse the judgment below, not because the trial court excluded "relevant mitigating evidence" within the meaning of those decisions, *id.,* at 114; see *Lockett, supra,* at 604–605, but because petitioner was not allowed to rebut evidence and argument used against him. See *Gardner* v. *Florida,* 430 U. S. 349 (1977).

I

In the course of cross-examining petitioner at his sentencing proceeding, the prosecutor adduced testimony that petitioner had kicked the bars of his cell following his arrest.[1] In closing argument, the prosecutor contended that petitioner was likely to commit violent crimes in prison if allowed to live, and referred to the incident in petitioner's cell to support his characterization of petitioner as a hopelessly violent man:

> "[Petitioner's] wife said he told her . . . that he had been raped in prison. With his history and what you know about him, who do you think the raper was and who do

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[1] The following colloquy took place at the close of the cross-examination:

"Q: You are the fellow that when you got to the Horry County jail went to kicking the cell, right?

"A: Yes, Sir.

"Q: That's you. [T]hat's the kind of fellow you are, but you are nice today, right?" App. 7.

> you think the rapee was? And if given the opportunity again with this four time sexual abusing loser, who do you think will get raped in prison? Will it be Ronald Skipper, big old robust Ronald Skipper who knocks woman *[sic]* in the side of the head, or will it be some little boy in prison?
>
> . . . . .
>
> "These are the mitigating circumstances submitted by the defendant. . . . That the defendant has shown significant and positive adjustments to confinement and education and employment skills that enable him to be a stable and productive prisoner. Didn't he admit kicking on the bars over there? That's the kind of prisoner he is. Kicking on the bar. Kicking on the bars. . . ." App. 14.

Petitioner had offered evidence that would undermine this line of argument: the testimony of two guards and a prison visitor, all of whom would have testified that petitioner had behaved well while in prison awaiting trial. The trial court excluded that evidence, relying on the Supreme Court of South Carolina's decision in *State* v. *Koon*, 278 S. C. 528, 298 S. E. 2d 769 (1982). Petitioner was sentenced to death, and the Supreme Court of South Carolina affirmed the sentence. 285 S. C. 42, 328 S. E. 2d 58 (1985).

II

The Court correctly concludes that the exclusion of the proffered testimony violated due process. *Ante*, at 5, n. 1. In *Gardner* v. *Florida*, *supra*, we vacated a death sentence on the ground that the sentencing judge had considered a confidential presentence report without permitting the defendant to see the report. The plurality concluded that the defendant was denied due process because "the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." *Id.*, at 362 (opinion of STEVENS, J.). See also *id.*, at 364 (WHITE, J., concurring in judgment) (applying the same analysis under the Eighth Amendment). As in *Gardner*, petitioner in this case was not permitted to "deny or explain" evidence on which his death sentence may, in part, have rested. This error was aggravated by the prosecutor's closing argument, which emphasized and exaggerated petitioner's misconduct in prison after his arrest. Therefore, petitioner's death sentence violates the rule in *Gardner*.

III

A

The Court unnecessarily abandons this narrow ground of decision for a broader one, holding that the proffered testimony was mitigating evidence that must be admitted under the Eighth Amendment. In my view, the Court's reasoning is flawed. The Eighth Amendment requires that the sentencing authority consider "relevant mitigating evidence" concerning the defendant's "character or record" and "the circumstances of the offense." *Eddings* v. *Oklahoma*, *supra*, at 114; *Lockett* v. *Ohio*, *supra*, at 604. But the States, and not this Court, retain "the traditional authority" to determine what particular evidence within the broad categories described in *Lockett* and *Eddings* is relevant in the first instance. 438 U. S., at 604, n. 12. As long as those determinations are reasonable—as long as they do not foreclose consideration of factors that may tend to reduce the defendant's culpability for his crime, see *Eddings*, *supra*, at 115–116—this Court should respect them.

I see no reason why a State could not, consistent with these principles, exclude evidence of a defendant's good behavior in jail following his arrest, as long as the evidence is not offered to rebut testimony or argument such as that tendered by the prosecution here. Such evidence has no bearing at all on the "circumstances of the offense," since it concerns the defendant's behavior after the crime has been committed. Nor does it say anything necessarily relevant about a defendant's "character or record," as that phrase was used in *Lockett* and *Eddings*.

Those decisions clearly focus on evidence that lessens the defendant's culpability for the crime for which he was convicted. The sentencing jury in *Lockett* was barred from considering evidence of the defendant's youth, her "lack of specific intent to cause death," and "her relatively minor part in the crime." 438 U. S., at 597. Such evidence obviously bore strongly on the degree to which the defendant was morally responsible for her crime; indeed, we have since held that similar evidence *precludes* application of the death penalty for precisely this reason. *Enmund* v. *Florida*, 458 U. S. 782, 798–801 (1982). In *Eddings*, the judge refused to consider the defendant's youth and history of "beatings by a harsh father, and of severe emotional disturbance." 455 U. S., at 115. We emphasized that this evidence tended to diminish the defendant's responsibility for his acts, noting that youths "are less mature and responsible than adults," *id.*, at 116, and that they "'deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults.'" *Id.*, at 115, n. 11, quoting Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime 7 (1978). The type of evidence required to be admitted under *Lockett* and *Eddings* thus pertained to conduct and circumstances *prior* to the crime, and to the nature and extent of the defendant's participation in the crime. In this case, for the first time, the Court classifies as "mitigating" conduct that occurred *after* the crime and after the accused has been charged. Almost by definition, such conduct neither excuses the defendant's crime nor reduces his responsibility for its commission. It cannot, therefore, properly be considered "mitigating evidence" that the sentencer must consider under the Constitution.

B

It is useful to recall the origins of the rule the Court applies today. Ten years ago, in *Woodson* v. *North Carolina*, 428 U. S. 280 (1976), we determined that States could not carry out the death penalty without some "particularized consideration of relevant aspects of the character and record of each convicted defendant." *Id.*, at 303 (plurality opinion). See also *Roberts* v. *Louisiana*, 428 U. S. 325, 333–336 (1976) (plurality opinion). That determination flowed from the conviction that "individual culpability is not always measured by the category of the crime committed." *Furman* v. *Georgia*, 408 U. S. 238, 402 (1972) (BURGER, C. J., dissenting), quoted in *Woodson*, *supra*, at 298. See also *Roberts*, *supra*, at 333. Thus, we reasoned, it was unconstitutionally arbitrary to execute a man or woman without considering factors showing that death was not a "just and appropriate sentence." *Woodson*, *supra*, at 304. Cf. *Enmund* v. *Florida*, *supra*.

Lockett and *Eddings* followed naturally from our decision in *Woodson*. But it also follows from *Woodson* and its companion cases that States are only bound to consider those factors that are central to the fundamental justice of execution. We have recognized that society has important and legitimate interests in retribution and deterrence, and that these interests provide the necessary justification for imposing the death penalty. *Gregg* v. *Georgia*, 428 U. S. 153, 183–187 (1976) (joint opinion). Society's legitimate desire for retribution is less strong with respect to a defendant who played a minor role in the murder for which he was convicted. Cf. *Lockett*, 438 U. S., at 597. Similarly, the death penalty has little deterrent force against defendants who have reduced capacity for considered choice. Cf. *Eddings*, 455 U. S., at 115, n. 11. Evidence concerning the degree of the defendant's participation in the crime, or his age and emotional history, thus bear directly on the fundamental justice of imposing capital punishment. That simply cannot be said of the defendant's behavior in prison following his arrest. Society's interest in retribution can hardly be lessened by the knowledge that a brutal murderer, for self-interested reasons, has been a model of deportment in prison while awaiting trial or sentence. Nor is society's important interest in deterrence served by allowing such a murderer to avoid the death penalty by following his counsel's advice to behave himself in a tightly controlled prison environment.[2]

IV

Even if a defendant's apparent capacity to adjust well to prison fell within the scope of the mitigating factors that must be considered under *Lockett* and *Eddings*, a State should have the right to exclude evidence of conduct in prison while awaiting trial or sentencing. One arrested for a capital crime, and particularly a convicted defendant awaiting sentencing, has every incentive to behave flawlessly in prison if good behavior might cause the sentencing authority to spare his life.[3] Good behavior in those circumstances would rarely be predictive as to the conduct of the prisoner *after* sentence has been imposed. For this further reason, state courts reasonably could determine that such evidence has little or no probative value. Certainly it will not aid the sentencer in "distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Furman* v. *Georgia, supra,* at 313 (WHITE, J., concurring), quoted in *Gregg* v. *Georgia, supra,* at 188.

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[2] We have noted that for many types of murders, "the death penalty undoubtedly is a significant deterrent." *Gregg* v. *Georgia*, 428 U. S. 153, 185–186 (1976). See also *id.*, at 186 (actual deterrent value of death penalty in particular contexts "is a complex factual issue the resolution of which properly rests with the legislatures"). This deterrent value inevitably is diluted when defendants are allowed to escape execution based on factors that have nothing to do with their criminal responsibility. The consequences of such mistakes extend further than the cases in which they occur, for when some defendants are able to avoid execution based on irrelevant criteria, there is a far graver risk of injustice in executing others. See *Furman* v. *Georgia*, 408 U. S. 238, 311–314 (1972) (WHITE, J., concurring). I thus find it difficult to accept the proposition that the Constitution *compels* States to consider factors, such as a defendant's willingness to conform to prison rules, that plainly undermine deterrence without advancing retributive goals.

[3] After today's decision competent defense counsel in capital cases will instruct their clients to behave like Eagle Scouts while awaiting trial, and particularly while awaiting sentencing. In capital cases, this will be more important to a defendant than the customary advice of counsel in a criminal

The Court's contrary determination apparently rests on the notion that the States have little or no authority to decide that certain types of evidence may have insufficient probative value to justify their admission. But cf. *ante,* at 7, n. 2. *Lockett* explicitly rejected such an approach, 438 U. S., at 604, n. 12, and for good reason. This Court has no special expertise in deciding whether particular categories of evidence are too speculative or insubstantial to merit consideration by the sentencer. Cf. *Barefoot* v. *Estelle,* 463 U. S. 880, 899–902 (1983). It makes little sense, then, to substitute our judgment of relevance for that of state courts and legislatures. Nor is such intrusive review necessary in this context to guard against fundamentally unjust executions. One cannot plausibly equate the type of evidence at issue in *Lockett* and *Eddings* with evidence that a capital defendant has refrained from assaulting anyone in prison while awaiting trial or sentencing. I would therefore leave the disposition of evidence of the kind involved here to the States, subject to the requirements of due process.

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trial to advise his client to behave himself while in the courtroom. It is indeed novel doctrine that compliance with this advice by a defendant charged with capital murder becomes a "mitigating factor" that the sentencing judge or jury must—as a matter of constitutional law—consider in passing sentence.

McLAUGHLIN *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 85-5189. Argued March 31, 1986—Decided April 29, 1986

On the basis of his display of an unloaded handgun in the course of a bank robbery, petitioner was convicted under 18 U. S. C. § 2113(d), which provides an enhanced penalty for assault by use of a "dangerous weapon" during a bank robbery.

Held: An unloaded handgun is a "dangerous weapon" within the meaning of § 2113(d). Pp. 17-18.

Affirmed.

STEVENS, J., delivered the opinion for a unanimous Court.

Stephen J. Cribari, by appointment of the Court, 474 U. S. 1003, argued the cause for petitioner. With him on the briefs was *Fred Warren Bennett.*

Christopher J. Wright argued the cause for the United States. With him on the brief were *Solicitor General Fried, Assistant Attorney General Trott, Deputy Solicitor General Frey*, and *Joel M. Gershowitz.*

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether an unloaded handgun is a "dangerous weapon" within the meaning of the federal bank robbery statute.

At about 9:30 a.m. on July 26, 1984, petitioner and a companion, both wearing stocking masks and gloves, entered a bank in Baltimore. Petitioner thereupon displayed a dark handgun and ordered everyone in the bank to put his hands up and not to move. While petitioner remained in the lobby area holding the gun, his companion vaulted the counter and placed about $3,400 in a brown paper bag. The two robbers were apprehended by a police officer as they left the bank. Petitioner's gun was not loaded.

Petitioner pleaded guilty to charges of bank robbery and bank larceny and, on the basis of stipulated evidence, was found guilty of assault during a bank robbery "by the use of a dangerous weapon."[1] The latter conviction depends on the validity of the District Court's conclusion that petitioner's unloaded gun was a "dangerous weapon" within the meaning of 18 U. S. C. § 2113(d). The Court of Appeals agreed with the District Court, and so do we.[2]

Three reasons, each independently sufficient, support the conclusion that an unloaded gun is a "dangerous weapon." First, a gun is an article that is typically and characteristically dangerous; the use for which it is manufactured and sold is a dangerous one, and the law reasonably may presume that such an article is always dangerous even though it may not be armed at a particular time or place. In addition, the display of a gun instills fear in the average citizen;[3] as a consequence, it creates an immediate danger that a violent response will ensue. Finally, a gun can cause harm when used as a bludgeon.

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[1] The federal bank robbery statute, 18 U. S. C. § 2113, provides in pertinent part:

"(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association . . .

. . . . .

"Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

"(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; . . .

. . . . .

"(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both."

[2] We granted certiorari, 474 U. S. 944 (1985), to resolve an apparent conflict. See, *e. g.*, *United States* v. *Wardy*, 777 F. 2d 101, 105–106 (CA2 1985); *United States* v. *Terry*, 760 F. 2d 939, 942 (CA9 1985).

Accordingly, the judgment of the Court of Appeals is

Affirmed.

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[3] The floor debate on the provision that became § 2113(d) indicates that Congress regarded incitement of fear as sufficient to characterize an apparently dangerous article (such as a wooden gun) as "dangerous" within the meaning of the statute. See 78 Cong. Rec. 8132 (1934) (colloquy among Reps. Sumners, Blanton, and Dockweiler).

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* FEDERAL LABOR RELATIONS AUTHORITY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-1728. Argued January 22, 1986—Decided April 29, 1986

During contract negotiations with the Equal Employment Opportunity Commission (EEOC), respondent American Federation of Government Employees (AFGE) submitted a proposal that would require the EEOC "to comply with OMB Circular A-76 and other applicable laws and regulations concerning contracting out" by federal agencies. The EEOC refused to bargain over the proposal on the ground that it was nonnegotiable under Title VII of the Civil Service Reform Act of 1978 (Act). On AFGE's petition for review, respondent Federal Labor Relations Authority (FLRA) rejected the EEOC's contentions that (1) because AFGE's proposed contract provision concerned contracting out, the proposal was inconsistent with the Act's management rights clause, which protects an agency's authority, "in accordance with applicable laws," to make determinations as to contracting out, and (2) the Circular itself forbade negotiation over the proposal. The Court of Appeals affirmed.

Held: The writ of certiorari previously granted by this Court is dismissed as improvidently granted. The EEOC did not assert before either the FLRA or the Court of Appeals its contentions here that (1) the Circular is not an "applicable la[w]" within the meaning of the Act's management rights clause, and therefore AFGE's proposal, by requiring compliance with the Circular, would intrude on management's reserved rights, and (2) any alleged violation of the Circular would not be grievable absent AFGE's proposal because the Circular is not a "law, rule, or regulation" within the meaning of the Act's definition of "grievance." Nor had the EEOC presented to the FLRA the argument that the Circular is a "Government-wide rule or regulation" for purposes of the Act's provision that excludes such rules or regulations from the scope of the duty to bargain. The Act provides that an objection that has not been urged before the FLRA shall not be considered on judicial review unless the failure to urge the objection is excused because of extraordinary circumstances. Such statutory bar is not "waived" simply because the FLRA fails to invoke it. Since the EEOC failed to excuse its failure to raise before the FLRA its principal objections to AFGE's proposal, this Court will not consider them. Moreover, even if the EEOC's failure to raise its "grievability" contention before the FLRA were to be excused on the ground that the FLRA, *sua sponte*, had injected the grievability issue into the proceedings, it did not excuse the EEOC's failure to raise its claim in the Court of Appeals. This Court's normal practice, applicable here, is to refrain from addressing issues not raised in the Court of Appeals.

Certiorari dismissed. Reported below: 240 U. S. App. D. C. 218, 744 F. 2d 842.

Deputy Solicitor General Kuhl argued the cause for petitioner. On the briefs were *Solicitor General Fried, Acting Assistant Attorney General Willard, Deputy Solicitor General Geller*, and *William Kanter*.

Ruth E. Peters argued the cause for respondents. With her on the brief for respondent Federal Labor Relations Authority were *Steven H. Svartz, William E. Persina*, and *Robert J. Englehart*. *William J. Stone* and *Mark D. Roth* filed a brief for respondent Union.*

PER CURIAM.

We granted certiorari, 472 U. S. 1026 (1985), to consider the question whether a union proposal that would require a federal agency to comply with OMB Circular A–76 (1983) Performance of Commercial Activities, which prescribes guidelines for contracting out by federal agencies, is negotiable under Title VII of the Civil Service Reform Act of 1978, 5 U. S. C. §7101 *et seq.*

In the course of contract negotiations with petitioner, the Equal Employment Opportunity Commission (EEOC), respondent American Federation of Government Employees (AFGE) submitted the following proposal:

**Ronald A. Zumbrun* and *John H. Findley* filed a brief for the Pacific Legal Foundation as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the National Federation of Federal Employees by *Patrick J. Riley;* and for the National Treasury Employees Union by *Lois G. Williams* and *Elaine D. Kaplan.*

> "The EMPLOYER agrees to comply with OMB Circular A–76 and other applicable laws and regulations concerning contracting out."

The EEOC took the position that this proposal was nonnegotiable under the Civil Service Reform Act (Act) and declined to bargain over it. AFGE then petitioned for review by respondent Federal Labor Relations Authority (FLRA), which is empowered by the Act to "resolv[e] issues relating to the duty to bargain" in the federal sector. 5 U. S. C. § 7105(a)(2)(E).

Before the FLRA, the EEOC's principal contention was that because the proposal concerned contracting out it was inconsistent with the Act's management rights clause, which, in pertinent part, provides that "nothing in [Title VII] shall affect the authority of any management official of any agency— . . . in accordance with applicable laws— . . . to make determinations with respect to contracting out." 5 U. S. C. § 7106(a)(2)(B) (emphasis added). The FLRA rejected this view, ruling that the proposal would not invade management's reserved rights since it would merely "require management to exercise its right to make contracting out determinations in accordance with whatever applicable laws and regulations exist at the time of such action." 10 F. L. R. A. 3 (1982). In the course of rejecting the EEOC's additional argument that the Circular itself forbade negotiation over the proposal, the FLRA went on to explain that even in the absence of AFGE's proposed contract provision "disputes concerning conditions of employment arising in connection with the application of the Circular would be covered by the negotiated grievance procedure." *Id.*, at 5.

A divided panel of the Court of Appeals for the District of Columbia Circuit affirmed the FLRA's decision. 240 U. S. App. D. C. 218, 744 F. 2d 842 (1984). The Court of Appeals found the EEOC's claim that any proposal regarding contracting out was barred by the management rights clause "untenable in light of the plain text of the clause."

Id., at 224, 744 F. 2d, at 848. Since management's reserved right was conditioned upon compliance with "applicable laws," and since the proposed contract language "essentially echoes the statutory requirement that contracting-out determinations be made in accordance with applicable laws," the proposal would not affect the EEOC's reserved authority to make contracting-out decisions. *Ibid.* The Court of Appeals also agreed with the FLRA that under 5 U. S. C. § 7103(a)(9)(C)(ii), which defines "grievance" to include "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment," an alleged violation of the Circular would be grievable even in the absence of AFGE's proposal. 240 U. S. App. D. C., at 227, 744 F. 2d, at 850. The dissenting judge believed that the proposal was intended to and would place additional constraints on the EEOC's reserved rights with respect to contracting out. *Id.*, at 228, 744 F. 2d, at 852 (MacKinnon, J., dissenting).

In this Court, the EEOC raises three principal arguments in support of its claim that AFGE's proposal is nonnegotiable. First, although it did not so argue to the FLRA or the Court of Appeals, the EEOC now contends that Circular A–76 is not an "applicable la[w]" within the meaning of the management rights clause, and therefore that AFGE's proposal, by requiring compliance with the Circular, would intrude on management's reserved rights. Second, and again for the first time in this Court, the EEOC asserts that an alleged violation of the Circular would not be grievable absent AFGE's proposal because the Circular is not a "law, rule, or regulation" within the meaning of § 7103(a)(9)'s definition of "grievance." Third, the EEOC suggests that the Circular *is* a "Government-wide rule or regulation" for purposes of 5 U. S. C. § 7117(a)(1), and argues that § 7117(a)(1) excludes such rules or regulations from the scope of the duty to bargain. This argument, too, was never presented to the FLRA.

Whatever their merit, we have concluded that these contentions, which are the linchpins of the EEOC's brief in this Court, are not properly before us. The Act expressly provides that when an aggrieved party seeks judicial review of a final order of the FLRA, "[n]o objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances." 5 U. S. C. § 7123(c). This language is virtually identical to that found in § 10(e) of the National Labor Relations Act, 29 U. S. C. § 160(e), which provides that "[n]o objection that has not been urged before the [National Labor Relations] Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." This Court has interpreted § 10(e) to mean that a Court of Appeals is "without jurisdiction to consider" an issue not raised before the Board if the failure to do so is not excused by extraordinary circumstances. *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U. S. 645, 665–666 (1982). See also *Detroit Edison Co.* v. *NLRB*, 440 U. S. 301, 311, n. 10 (1979); *May Department Stores Co.* v. *NLRB*, 326 U. S. 376, 386, n. 5 (1945). The Court of Appeals for the District of Columbia Circuit has similarly held that under § 7123(c) review of "issues that an agency never placed before the Authority" is barred absent extraordinary circumstances. *Department of Treasury* v. *FLRA*, 227 U. S. App. D. C. 377, 382, 707 F. 2d 574, 579 (1983). See also *FLRA* v. *Social Security Administration*, 243 U. S. App. D. C. 338, 342, 753 F. 2d 156, 160–161 (1985). We agree with this interpretation of § 7123(c), which we think is not "waived" simply because the FLRA fails to invoke it. Section 7123(c) speaks to courts, not parties, and its plain language evinces an intent that the FLRA shall pass upon issues arising under the Act, thereby bringing its expertise to bear on the resolution of those issues. We need not decide whether an express waiver by the FLRA would be relevant in determining whether there are "extraordinary circumstances" excusing a party's failure to raise an issue before that agency, for there is no such waiver here. We do, however, reject JUSTICE STEVENS' theory of implied waiver, which, it should be noted, is not offered as an interpretation of the exception for "extraordinary circumstances." We think that if Congress had meant there to be two exceptions to the bar raised by § 7123(c), instead of one, it would have said so.

Since the EEOC has failed to excuse its failure to raise before the FLRA what now appear to be its principal objections to AFGE's proposal, we decline to consider them. Conceivably, the EEOC's failure to apprise the FLRA of its claim that the Circular is not a "law, rule, or regulation" for purposes of the Act's definition of grievance is attributable to what appears to have been the FLRA's *sua sponte* injection of the grievability issue into these proceedings in rendering its decision. But at most that might excuse the EEOC's failure to press this claim before the FLRA; it does not excuse the EEOC's failure to raise it at any point in the Court of Appeals. This latter failure was "brought to our attention . . . in respondent's brief in opposition to the petition for certiorari," *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 816 (1985), as was the EEOC's failure to raise its claim that the Circular is not an "applicable la[w]." See Brief for FLRA in Opposition 11, n. 8, 17, n. 17. Our normal practice, from which we see no reason to depart on this occasion, is to refrain from addressing issues not raised in the Court of Appeals. See, *e. g.*, *FTC* v. *Grolier, Inc.* 462 U. S. 19, 23, n. 6 (1983); *Rogers* v. *Lodge*, 458 U. S. 613, 628, n. 10 (1982). Under these circumstances, several central issues on which resolution of the question presented may well turn cannot be reached or resolved. Accordingly, we dismiss the writ of certiorari as improvidently granted.

It is so ordered.

JUSTICE WHITE, dissenting.

Because I agree with JUSTICE STEVENS that the Court should decide the merits of this case, I cannot join the Court's opinion or judgment.

JUSTICE STEVENS, dissenting.

In my opinion the Court should decide the merits of this case. Two federal agencies disagree about the meaning of an important federal statute; it would serve the interests of both to have the disagreement resolved as promptly as possible. To this end, neither agency has suggested that the arguments advanced by the other are not properly before the Court. Since we are now fully advised about the merits, it would be most efficient for us to resolve the issue now rather than to postpone decision until another similar case works its way up through the agency and the Court of Appeals.[1]

The Federal Labor Relations Authority (FLRA) is the agency designated by Congress to enforce the Civil Service Reform Act of 1978, 5 U. S. C. § 7101 *et seq.* We must therefore presume that the FLRA has a thorough understanding of the provisions of that Act, including § 7123(c).[2] See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844–845 (1984). Under that provision, the Authority surely knew that it could have interposed an objection to our consideration of arguments advanced by the Solicitor General on behalf of the EEOC's construction of the statute,[3] but it elected not to take such an approach in this Court.[4] In so doing, it has waived the protection of § 7123(c)—and given its palpable interest in having the merits decided, I believe it has acted wisely in doing so.[5]

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[1] "[R]espondent's argument might have prevailed had it been made to the Court of Appeals. But we do not think that judicial economy is served by invoking [a contemporaneous-objection rule] at this point, *after* we have granted certiorari and the case has received plenary consideration on the merits. Our decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of one or more of the questions presented in the petition. Nonjurisdictional defects of this sort should be brought to our attention *no later* than in respondent's brief in opposition to the petition for certiorari; if not, we consider it within our discretion to deem the defect waived." *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 815–816 (1985).

[2] Section 7123(c) provides that "[n]o objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances."

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[3] See Brief for FLRA in Opposition 11, n. 8, 17, n. 17.

[4] The Court's "*per curiam*" opinion implies that its reasons for dismissing the petition for writ of certiorari were "brought to our attention . . . in respondent's brief in opposition to the petition for writ of certiorari." See *ante*, at 24. If this be true, one can only wonder why the Court decided to grant certiorari. As a matter of fact, however, respondent FLRA's brief in opposition did not even cite § 7123(c) and did not suggest that any of the EEOC's contentions had been waived; it merely made the rhetorical point that a contention that had not been previously advanced would not appear to have much merit.

[5] Because the Court has not called for supplementary briefing on the Authority's ability to waive § 7123(c), its *per curiam* opinion in this case is the functional equivalent of a summary disposition on this point, a manner of proceeding we customarily reserve for settled issues of law. See *Wyrick* v. *Fields*, 459 U. S. 42, 51 (1982) (MARSHALL, J., dissenting); *Schweiker* v. *Hansen*, 450 U. S. 785, 791 (1981) (MARSHALL, J., dissenting); R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice § 5.12, p. 277 (6th ed. 1986). Until today, however, the waivability of § 7123(c) had never been addressed by this Court. (Indeed, § 7123(c) itself has never received an authoritative construction in this tribunal.) The Court nonetheless proceeds on the confident assumption that § 7123(c) should be construed *in pari materia* with § 10(e) of the National Labor Relations Act, 29 U. S. C. § 160(e), because the language of the former is "virtually identical" to the language of the latter. *Ante*, at 23. Even accepting the propriety of parallel interpretation—an assumption for which the Court adduces no support in either the Civil Service Reform Act or its legislative history—the § 10(e) cases relied on by the Court do not decide the waiver issue presented by this case. In *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U. S. 645, 665–666 (1982), the Solicitor General offered the § 10(e) defense in his brief in opposition to certiorari, see Brief for National Labor Relations Board in Opposition, O. T. 1981, No. 80–1798, p. 11; in *Detroit Edison Co.* v. *NLRB*, 440 U. S. 301, 311–312, n. 10 (1979), he offered it in his brief on the merits in response to an argument raised for the first time in petitioner's brief on the merits, see Brief for Respondent,

On the merits, I am persuaded that Circular A-76 is not one of the "applicable laws" described in 5 U. S. C. § 7106(a)(2)(B) and that requiring compliance with the Circular would intrude on management's reserved rights. Accordingly, I would reverse the judgment of the Court of Appeals.

O. T. 1978, No. 77-968, pp. 17-18; in *May Department Stores Co.* v. *NLRB*, 326 U. S. 376, 387, n. 5 (1945), the Court found "the objection . . . sufficient" to "put the Board on notice of the issue now presented." Thus, in none of these cases did this Court honor an objection not relied on by the affected agency. Moreover, all three dispositions are consistent with the practice we announced in *Oklahoma City* v. *Tuttle*, 471 U. S., at 816, that "[n]onjurisdictional defects [barring our review] should be brought to our attention *no later* than in respondent's brief in opposition to the petition for certiorari." Because § 7123(c) does not deprive this Court of subject-matter jurisdiction (indeed, it authorizes waiver in "extraordinary circumstances," see *Department of Treasury* v. *FLRA*, 277 U. S. App. D. C. 377, 381-384, 707 F. 2d 574, 578-581 (1983)), I would adhere to the practice we announced in *Tuttle* and decide the questions presented.

Finally, even if I were persuaded that § 7123(c) is a nonwaivable bar to our consideration of the arguments advanced by the Solicitor General for the first time in the petition for certiorari, I still would not dismiss the writ because the arguments that were properly presented to the Court of Appeals had enough force to convince one judge of that court that the FLRA's construction of the Act is erroneous. The Court does not adequately explain why its conclusion that *some* arguments cannot be advanced by the EEOC leads to the further conclusion that its entire petition must be dismissed.

TURNER *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84-6646. Argued December 12, 1985—Decided April 30, 1986

Petitioner, a black man, was indicted in Virginia on charges of capital murder for fatally shooting the white proprietor of a jewelry store in the course of a robbery. During *voir dire*, the state trial judge refused petitioner's request to question the prospective jurors on racial prejudice. The jury convicted petitioner, and, after a separate sentencing hearing, recommended that he be sentenced to death, a recommendation the trial judge accepted. The Virginia Supreme Court upheld the death sentence, rejecting petitioner's argument that the trial judge deprived him of a fair trial by refusing to question the prospective jurors on racial prejudice. Petitioner then sought habeas corpus relief in Federal District Court, which rejected the same argument and denied relief, and the Court of Appeals affirmed.

Held: The judgment is reversed, and the case is remanded.

753 F. 2d 342, reversed and remanded.

JUSTICE WHITE delivered the opinion of the Court with respect to Parts I and III, concluding that a defendant accused of an interracial capital crime is entitled to have prospective jurors informed of the victim's race and questioned on the issue of racial bias. This rule is minimally intrusive. As in other cases involving "special circumstances," the trial judge retains discretion as to the form and number of questions, including whether to question the venire individually or collectively. Also, a defendant cannot complain of a failure to question the venire on racial prejudice unless he has specifically requested such an inquiry. Pp. 29–33, 36–37.

JUSTICE WHITE, joined by JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE O'CONNOR, concluded in Parts II and IV that:

(1) The risk that racial prejudice may have infected petitioner's capital sentencing is unacceptable in light of the ease with which that risk, being especially serious in view of the finality of the death sentence, could have been minimized. *Ristaino* v. *Ross*, 424 U. S. 589, distinguished. Pp. 33–36.

(2) While it is not necessary that petitioner be retried on the issue of guilt, there was an unacceptable risk of racial prejudice infecting the *capital sentencing proceeding*, and the inadequacy of the *voir dire* re-

quires that his death sentence be vacated. This unacceptable risk arose from the conjunction of three factors: the fact that the crime charged involved interracial violence, the broad discretion given the jury under Virginia law at the sentencing hearing, and the special seriousness of the risk of improper sentencing in a capital case. Pp. 37–38.

WHITE, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and III, in which BRENNAN, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined, and an opinion with respect to Parts II and IV, in which BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. BURGER, C. J., concurred in the judgment. BRENNAN, J., filed an opinion concurring in part and dissenting in part, *post*, p. 38. MARSHALL, J., filed an opinion concurring in the judgment in part and dissenting in part, in which BRENNAN, J., joined, *post*, p. 45. POWELL, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 45.

J. Lloyd Snook III, by appointment of the Court, 471 U. S. 1134, argued the cause and filed briefs for petitioner.

James E. Kulp, Senior Assistant Attorney General of Virginia, argued the cause for respondent. With him on the brief were *William G. Broaddus*, Attorney General, and *Robert H. Anderson III*, Assistant Attorney General.

JUSTICE WHITE announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and III, and an opinion with respect to Parts II and IV, in which JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE O'CONNOR join.

Petitioner is a black man sentenced to death for the murder of a white storekeeper. The question presented is whether the trial judge committed reversible error at *voir dire* by refusing petitioner's request to question prospective jurors on racial prejudice.

I

On July 12, 1978, petitioner entered a jewelry store in Franklin, Virginia, armed with a sawed-off shotgun. He demanded that the proprietor, W. Jack Smith, Jr., put jewelry and money from the cash register into some jewelry bags. Smith complied with petitioner's demand, but triggered a silent alarm, alerting the Police Department. When Alan Bain, a police officer, arrived to inquire about the alarm, petitioner surprised him and forced him to surrender his revolver.

Having learned that Smith had triggered a silent alarm, petitioner became agitated. He fired toward the rear wall of the store and stated that if he saw or heard any more police officers, he was going to start killing those in the store.[1] When a police siren sounded, petitioner walked to where Smith was stationed behind a counter and without warning shot him in the head with Bain's pistol, wounding Smith and causing him to slump incapacitated to the floor.

Officer Bain attempted to calm petitioner, promising to take him anywhere he wanted to go and asking him not to shoot again. Petitioner angrily replied that he was going to kill Smith for "snitching," and fired two pistol shots into Smith's chest, fatally wounding him. As petitioner turned away from shooting Smith, Bain was able to disarm him and place him under arrest.

A Southampton County, Virginia, grand jury indicted petitioner on charges of capital murder, use of a firearm in the commission of a murder, and possession of a sawed-off shotgun in the commission of a robbery. Petitioner requested and was granted a change of venue to Northampton County, Virginia, a rural county some 80 miles from the location of the murder.

Prior to the commencement of *voir dire*, petitioner's counsel submitted to the trial judge a list of proposed questions, including the following:

> "'The defendant, Willie Lloyd Turner, is a member of the Negro race. The victim, W. Jack Smith, Jr., was a white Caucasian. Will these facts prejudice you against Willie Lloyd Turner or affect your ability to render a fair

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[1] In addition to Smith and Bain, a store employee and two customers were present at this time.

> and impartial verdict based solely on the evidence?'" *Turner* v. *Commonwealth,* 221 Va. 513, 522, n. 8, 273 S. E. 2d 36, 42, n. 8 (1980).

The judge declined to ask this question, stating that it "has been ruled on by the Supreme Court."[2] App. 15. The judge did ask the venire, who were questioned in groups of five in petitioner's presence, whether any person was aware of any reason why he could not render a fair and impartial verdict, to which all answered "no." *Id.*, at 17, 78. At the time the question was asked, the prospective jurors had no way of knowing that the murder victim was white.

The jury that was empaneled, which consisted of eight whites and four blacks, convicted petitioner on all of the charges against him. *Id.*, at 97 and Addendum. After a separate sentencing hearing on the capital charge, the jury recommended that petitioner be sentenced to death, a recommendation the trial judge accepted. *Id.*, at 18, 19.

Petitioner appealed his death sentence to the Virginia Supreme Court. Among other points, he argued that the trial judge deprived him of his constitutional right to a fair and impartial jury by refusing to question prospective jurors on racial prejudice. The Virginia Supreme Court rejected this argument. Relying on our decision in *Ristaino* v. *Ross,* 424 U. S. 589 (1976), the court stated that a trial judge's refusal to ask prospective jurors about their racial attitudes, while perhaps not the wisest decision as a matter of policy, is not constitutionally objectionable in the absence of factors akin to those in *Ham* v. *South Carolina,* 409 U. S. 524 (1973).[3] *Turner* v. *Commonwealth, supra,* at 523, 273 S. E.

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[2] Whether the trial judge was referring to this Court's decision in *Ristaino* v. *Ross,* 424 U. S. 589 (1976), or to a decision of the Virginia Supreme Court, is unclear.

[3] In *Ham,* a young black man known in his small South Carolina hometown as a civil rights activist was arrested and charged with possession of marijuana. We held that the trial judge committed reversible error in refusing to honor Ham's request to question prospective jurors on racial

2d, at 42. The court held that "[t]he mere fact that a defendant is black and that a victim is white does not constitutionally mandate . . . an inquiry [into racial prejudice]." *Ibid.*[4]

Having failed in his direct appeal, petitioner sought habeas corpus relief in the Federal District Court for the Eastern District of Virginia. App. 97. Again he argued without success that the trial judge's refusal to ask prospective jurors about their racial attitudes deprived him of his right to a fair trial. *Id.*, at 102–104. The District Court noted that in *Ristaino*, *supra*, which involved a crime of interracial violence,[5] we held that inquiry into racial prejudice at *voir dire* was not constitutionally required because the facts of the case "'did not suggest a significant likelihood that racial prejudice might infect [the defendant's] trial.'" App. 103 (quoting 424 U. S., at 598). The court found the present case like *Ristaino* and unlike *Ham* in that "racial issues [are] not 'inextricably bound up with the facts at trial.'" App. 103.

The United States Court of Appeals for the Fourth Circuit affirmed the District Court's denial of habeas corpus relief for

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prejudice. In *Ristaino*, *supra*, we specified the factors which mandated an inquiry into racial prejudice in *Ham:*

"Ham's defense was that he had been framed because of his civil rights activities. His prominence in the community as a civil rights activist, if not already known to veniremen, inevitably would have been revealed to the members of the jury in the course of his presentation of that defense. Racial issues therefore were inextricably bound up with the conduct of the trial. Further, Ham's reputation as a civil rights activist and the defense he interposed were likely to intensify any prejudice that individual members of the jury might harbor." 424 U. S., at 596–597.

[4] The court also rejected petitioner's reliance on a statistical study showing that black defendants who kill white victims are sentenced to death with disproportionate frequency. The court stated that the study, which is based on statistics compiled in other States, has little utility in establishing the potential for racial prejudice in Virginia. 221 Va., at 523, n. 9, 273 S. E. 2d, at 42, n. 9.

[5] In *Ristaino*, the defendant was one of three black men charged with assaulting a white security guard with intent to murder him. The assault occurred in the course of a robbery. 424 U. S., at 590.

petitioner. *Turner* v. *Bass*, 753 F. 2d 342 (1985). Like the Virginia Supreme Court and the District Court, the Fourth Circuit found no "special circumstances" in this case analogous to those in *Ham*. The court rejected the idea that "the nature of the crime or punishment itself is . . . a special circumstance." 753 F. 2d, at 345. Relying on *Ristaino*, the court likewise found no special circumstance in the fact that petitioner is black and his victim white.[6]

We granted certiorari to review the Fourth Circuit's decision that petitioner was not constitutionally entitled to have potential jurors questioned concerning racial prejudice. 471 U. S. 1098 (1985). We reverse.

II

The Fourth Circuit's opinion correctly states the analytical framework for evaluating petitioner's argument: "The broad inquiry in each case must be . . . whether under all of the circumstances presented there was a constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be indifferent as [they stand] unsworne." 753 F. 2d, at 345–346 (internal quotation omitted). The Fourth Circuit was correct, too, in holding that under *Ristaino* the mere fact that petitioner is black and his victim white does not constitute a "special circumstance" of constitutional proportions. What sets this case apart from *Ristaino*, however, is that in addition to petitioner's being accused of a crime against a white victim, the crime charged was a capital offense.

In a capital sentencing proceeding before a jury, the jury is called upon to make a "highly subjective, 'unique, individualized judgment regarding the punishment that a particular person deserves.'" *Caldwell* v. *Mississippi*, 472 U. S. 320, 340, n. 7 (1985) (quoting *Zant* v. *Stephens*, 462 U. S. 862, 900 (1983) (REHNQUIST, J., concurring in judgment)). The Virginia statute under which petitioner was sentenced is instructive of the kinds of judgments a capital sentencing jury must make. First, in order to consider the death penalty, a Virginia jury must find either that the defendant is likely to commit future violent crimes or that his crime was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." Va. Code § 19.2–264.2 (1983). Second, the jury must consider any mitigating evidence offered by the defendant. Mitigating evidence may include, but is not limited to, facts tending to show that the defendant acted under the influence of extreme emotional or mental disturbance, or that at the time of the crime the defendant's capacity "to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired." § 19.2–262.4(B). Finally, even if the jury has found an aggravating factor, and irrespective of whether mitigating evidence has been offered, the jury has discretion not to recommend the death sentence, in which case it may not be imposed. § 19.2–264.2.

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[6] To the suggestion that it is a special circumstance that black murderers whose victims are white are executed with disproportionate frequency, the court responded by quoting our opinion in *Rosales-Lopez* v. *United States*, 451 U. S. 182 (1981), for the proposition that "'[t]here is no constitutional presumption of juror bias for or against members of any particular racial or ethnic groups.'" 753 F. 2d, at 345 (quoting 451 U. S., at 190).

Virginia's death-penalty statute gives the jury greater discretion than other systems which we have upheld against constitutional challenge. See, *e. g.*, *Jurek* v. *Texas*, 428 U. S. 262 (1976). However, our cases establish that every capital sentencer must be free to weigh relevant mitigating evidence before deciding whether to impose the death penalty, see, *e. g.*, *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982); *Lockett* v. *Ohio*, 438 U. S. 586, 597–609 (1978) (plurality opinion), and that in the end it is the jury that must make the difficult, individualized judgment as to whether the defendant deserves the sentence of death.

Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected. On the facts of this case, a juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified under Virginia law. Such a juror might also be less favorably inclined toward petitioner's evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty.[7]

The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence. "The Court, as well as the separate opinions of a majority of the individual Justices, has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California* v. *Ramos*, 463 U. S. 992, 998–999 (1983). We have struck down capital sentences when we found that the circumstances under which they were imposed "created an unacceptable risk that 'the death penalty [may have been] meted out arbitrarily or capriciously' or through 'whim . . . or mistake.'" *Caldwell*, *supra*, at 343 (O'CONNOR, J., concurring in part and concurring in judgment) (citation omitted). In the present case, we find the risk that racial prejudice may have infected petitioner's capital sentencing unacceptable in light of the ease with which that risk could have been minimized.[8] By refusing to question prospective jurors on racial prejudice, the trial judge failed to adequately protect petitioner's constitutional right to an impartial jury.[9]

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[7] In referring to the facts of petitioner's crime, we do not retreat from our holding in *Ristaino*. The fact of interracial violence alone is not a "special circumstance" entitling the defendant to have prospective jurors questioned about racial prejudice. It should be clear, though, that our holding in *Ristaino* was not based on a blind belief that the facts presented in that case could not evoke racial prejudice. As we stated in *Rosales-Lopez* v. *United States*, 451 U. S., at 192: "It remains an unfortunate fact in our society that violent crimes perpetrated against members of other racial or ethnic groups often raise [a reasonable possibility that racial prejudice would influence the jury]." *Ristaino* does not condone this possibility, but simply leaves it to the trial judge's discretion to decide what measures to take in screening out racial prejudice, absent a showing of "significant likelihood that racial prejudice might infect [the] trial." 424 U. S., at 598.

III

We hold that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias.[10] The rule we propose is minimally intrusive; as in other cases involving "special circumstances," the trial judge retains discretion as to the form and number of questions on the subject, including the decision whether to question the venire individually or collectively. See *Ham* v. *South Carolina*, 409 U. S., at 527. Also, a defendant cannot complain of a judge's failure to question the venire on racial prejudice unless the defendant has specifically requested such an inquiry.

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[8] JUSTICE POWELL's dissent takes issue with what he terms the "singularly unwise and unjustified presumption that capital jurors harbor latent racial bias." *Post*, at 53. This remark fails to distinguish between our recognition that jurors in a capital case *may* harbor racial bias, and the presumption, which we do not make, that any particular capital jurors are in fact racially prejudiced. JUSTICE POWELL implicitly recognizes such a distinction, but only when it suits his purposes; thus, he does not say that in a case like *Ham* v. *South Carolina*, 409 U. S. 524 (1973), the jurors are presumed to be prejudiced, but rather that there is "an unacceptable risk that racial prejudice will 'distort the trial.'" *Post*, at 50.

Once rhetoric is put aside, it is plain that there is some risk of racial prejudice influencing a jury whenever there is a crime involving interracial violence, see n. 7, *supra;* the only question is at what point that risk becomes constitutionally unacceptable. Notwithstanding JUSTICE POWELL's attempt to minimize the significance of the discretion entrusted to the jury at a capital sentencing hearing, *post*, at 50–52, we are convinced that such discretion gives greater opportunity for racial prejudice to operate than is present when the jury is restricted to factfinding. This, together with the special seriousness with which we view the risk of racial prejudice influencing a capital sentencing decision, is what distinguishes this case from *Ristaino*.

[9] The right to an impartial jury is guaranteed by both the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, and by principles of due process. *Ristaino*, 424 U. S., at 595, n. 6.

IV

The inadequacy of *voir dire* in this case requires that petitioner's death sentence be vacated. It is not necessary, however, that he be retried on the issue of guilt. Our judgment in this case is that there was an unacceptable risk of racial prejudice infecting the *capital sentencing proceeding*. This judgment is based on a conjunction of three factors: the fact that the crime charged involved interracial violence, the broad discretion given the jury at the death-penalty hearing, and the special seriousness of the risk of improper sentencing in a capital case.[11] At the guilt phase of petitioner's trial, the jury had no greater discretion than it would have had if the crime charged had been noncapital murder. Thus, with respect to the guilt phase of petitioner's trial, we find this case to be indistinguishable from *Ristaino*, to which we continue to adhere.[12] See n. 5, *supra*.

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[10] JUSTICE POWELL contends that inquiry into racial prejudice "in the absence of circumstances that make clear a need for it could well have the negative effect of suggesting to the jurors that race somehow is relevant to the case." *Post*, at 48–49, n. 5. Whether such a concern is purely chimerical or not is a decision we leave up to a capital defendant's counsel. Should defendant's counsel decline to request *voir dire* on the subject of racial prejudice, we in no way require or suggest that the judge broach the topic *sua sponte*.

[11] We find it unnecessary to evaluate the statistical studies which petitioner has introduced in support of the proposition that black defendants who kill whites are executed with disproportionate frequency.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE concurs in the judgment.

JUSTICE BRENNAN, concurring in part and dissenting in part.

The Court's judgment vacates petitioner's sentence of death while refusing to disturb his conviction. Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), I agree that the death sentence in this case must be vacated. But even if I did not hold that view, I would still find that the sentence was unconstitutionally imposed in this case. In my view, the constitutional right of a defendant to have a trial judge ask the members of the venire questions concerning possible racial bias is triggered whenever a violent interracial crime has been committed. See *Ross* v. *Massachusetts*, 414 U. S. 1080 (1973) (MARSHALL, J., dissenting from denial of certiorari). The reality of race relations in this country is such that we simply may not presume impartiality, and the risk of bias runs especially high when members of a community serving on a jury are to be confronted with disturbing evidence of criminal conduct that is often terrifying and abhorrent. In analyzing the question of when the Constitution requires trial judges to accommodate defendants' requests for inquiries into racial prejudice, I, like the Court, am influenced by what the Court correctly describes as the "ease" with which the risk may be minimized. *Ante*, at 36.

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[12] JUSTICE BRENNAN incorrectly reads into our opinion a suggestion that "the constitutional entitlement to an impartial jury attaches only at the sentencing phase." *Post*, at 43. The real question is not whether there is a constitutional right to an impartial jury throughout a criminal trial, see n. 9, *supra*, but what prophylactic rules the Constitution imposes on the States in furtherance of that right. What we held in *Ristaino*, and reaffirm today, is that absent "special circumstances" that create a particularly compelling need to inquire into racial prejudice, the Constitution leaves the conduct of *voir dire* to the sound discretion of state trial judges.

The implication of JUSTICE BRENNAN's opinion is that every crime of interracial violence is a "special circumstance." Over JUSTICE BRENNAN's dissent, however, *Ristaino* squarely rejected this approach. Moreover, we are unpersuaded by JUSTICE BRENNAN's view that "the opportunity for racial bias to taint the jury process is . . . equally a factor at the guilt [and sentencing] phase[s] of a bifurcated capital trial." *Post*, at 41. As we see it, the risk of racial bias at sentencing hearings is of an entirely different order, because the decisions that sentencing jurors must make involve far more subjective judgments than when they are deciding guilt or innocence.

In any event, I cannot fully join either the Court's judgment or opinion. For in my view, the decision in this case, although clearly half right, is even more clearly half wrong. After recognizing that the constitutional guarantee of an impartial jury entitles a defendant in a capital case involving interracial violence to have prospective jurors questioned on the issue of racial bias—a holding which requires that this case be reversed and remanded for new sentencing—the Court disavows the logic of its own reasoning in denying petitioner Turner a new trial on the issue of his guilt. It accomplishes this by postulating a jury role at the sentencing phase of a capital trial fundamentally different from the jury function at the guilt phase and by concluding that the former gives rise to a significantly greater risk of a verdict tainted by racism. Because I believe that the Court's analysis improperly intertwines the significance of the *risk* of bias with the *consequences* of bias, and because in my view the distinction between the jury's role at a guilt trial and its role at a sentencing hearing is a distinction without substance in so far as juror bias is concerned, I join only that portion of the Court's judgment granting petitioner a new sentencing proceeding, but dissent from that portion of the judgment refusing to vacate the conviction.

The Sixth Amendment guarantees criminal defendants an impartial jury. This is not mere exhortation for it has been noted that "the right to an impartial jury carries with it the concomitant right to take reasonable steps designed to insure that the jury is impartial." *Ham* v. *South Carolina*, 409 U. S. 524, 532 (1973) (MARSHALL, J. concurring in part and dissenting in part). Among the most important of the means designed to insure an impartial jury is the right to strike those jurors who manifest an inability to try the case solely on the basis of the evidence. This right to exclude incompetent jurors cannot be exercised meaningfully or effectively unless counsel has sufficient information with which to evaluate members of the venire. As JUSTICE WHITE noted for the Court in *Rosales-Lopez* v. *United States*, 451 U. S. 182, 188 (1981), "lack of adequate *voir dire* impairs the defendant's right to exercise peremptory challenges where provided by statute or rule, as it is in the federal courts" (footnote omitted).

Recognizing this fact, we held long ago that "essential demands of fairness" may require a judge to ask jurors whether they entertain any racial prejudice. *Aldridge* v. *United States*, 283 U. S. 308 (1931); see also *Ham* v. *South Carolina*. More recently, we attempted to refine the analysis, and declared that when there is a showing of a "likelihood" that racial or ethnic prejudice may affect the jurors, the Constitution requires a trial judge to honor a defendant's request to examine the jurors' ability to deal impartially with the evidence adduced at trial. *Rosales-Lopez*, *supra* at 190. Exercising our supervisory powers over the federal courts, we held in *Rosales-Lopez* that when a violent crime has been committed, and the victim and the accused are of different races, a *per se* inference of a "reasonable possibility" of prejudice is shown. In the present case, we deal with a criminal case from a state court involving an act of interracial violence, and are faced with the question of what factors and circumstances will elevate this presumptive "reasonable possibility" of prejudice into a constitutionally significant "likelihood" of prejudice.

The Court identifies three factors, the "conjunction" of which in its view entitled petitioner Turner as a matter of constitutional right to have the jury questioned on racial bias. These are (1) the fact that the crime committed involved interracial violence; (2) the broad discretion given the jury at the death penalty hearing; and (3) the "special seriousness of the risk of improper sentencing in a capital case." *Ante,* at 37. I agree with the Court that when these three factors are present, as they were at petitioner's sentencing hearing, the trial court commits constitutional error in refusing a defense request to ask the jurors if the race of either the victim or the accused will bear on their ability to render a decision based solely on the evidence. What I cannot accept is that the judge is released from this obligation to insure an impartial jury—or, to put it another way, that the defendant is stripped of this constitutional safeguard—when a capital jury is hearing evidence concerning a crime involving interracial violence but passing "only" on the issue of guilt/innocence, rather than on the appropriate sentence.

The Court's argument is simply untenable on its face. As best I can understand it, the thesis is that since there is greater discretion entrusted to a capital jury in the sentencing phase than in the guilt phase, "there is [in the sentencing hearing] a unique opportunity for racial prejudice to operate but remain undetected." *Ante,* at 35. However, the Court's own discussion of the issues demonstrates that the opportunity for racial bias to taint the jury process is not "uniquely" present at a sentencing hearing, but is equally a factor at the guilt phase of a bifurcated capital trial.

According to the Court, a prejudiced juror sitting at a sentencing hearing might be influenced by his racial bias in deciding whether the crime committed involved aggravating factors specified under state law; the Court notes that racial prejudice might similarly cause that juror to be less favorably inclined toward an accused's evidence of mitigating circumstances. Moreover, the Court informs us:

> "More subtle, less consciously held racial attitudes could also influence a juror's decision. . . . Fear of blacks, which could easily be stirred up by the violent facts of [a] crime, might incline a juror to favor the death penalty." *Ibid.*

The flaw in this "analysis" is that there is simply no connection between the proposition advanced, the support proffered for that thesis, and the conclusion drawn. In other words, it is certainly true, as the Court maintains, that racial bias inclines one to disbelieve and disfavor the object of the prejudice, and it is similarly incontestable that subconscious, as well as express, racial fears and hatreds operate to deny fairness to the person despised; that is why we seek to insure that the right to an impartial jury is a meaningful right by providing the defense with the opportunity to ask prospective jurors questions designed to expose even hidden prejudices. But the Court never explains why these biases should be of less concern at the guilt phase than at the sentencing phase. The majority asserts that "a juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified under Virginia law." *Ibid.* But might not that same juror be influenced by those same prejudices in deciding whether, for example, to credit or discredit white witnesses as opposed to black witnesses at the guilt phase? Might not those same racial fears that would incline a juror to favor death not also incline a juror to favor conviction?

A trial to determine guilt or innocence is, at bottom, nothing more than the sum total of a countless number of small discretionary decisions made by each individual who sits in the jury box. The difference between conviction and acquittal turns on whether key testimony is believed or rejected; on whether an alibi sounds plausible or dubious; on whether a character witness appears trustworthy or unsavory; and on whether the jury concludes that the defendant had a motive, the inclination, or the means available to commit the crime charged. A racially biased juror sits with blurred vision and impaired sensibilities and is incapable of fairly making the myriad decisions that each juror is called upon to make in the course of a trial. To put it simply, he cannot judge because he has prejudged. This is equally true at the trial on guilt as at the hearing on sentencing.

To sentence an individual to death on the basis of a proceeding tainted by racial bias would violate the most basic values of our criminal justice system. This the Court understands. But what it seems not to comprehend is that to permit an individual to be *convicted* by a prejudiced jury violates those same values in precisely the same way. The incongruity of the Court's split judgment is made apparent after it is appreciated that the opportunity for bias to poison decision-making operates at a guilt trial in the same way as it does at a sentencing hearing and after one returns to the context of the case before us. Implicit in the Court's judgment is the acknowledgment that there was a likelihood that the jury that pronounced the death sentence acted, in part, on the basis of racial prejudice. But the exact same jury convicted Turner. Does the Court really mean to suggest that the constitutional entitlement to an impartial jury attaches only at the sentencing phase? Does the Court really believe that racial biases are turned on and off in the course of one criminal prosecution?

My sense is that the Court has confused the *consequences* of an unfair trial with the *risk* that a jury is acting on the basis of prejudice. In other words, I suspect that what is really animating the Court's judgment is the sense of outrage it rightly experiences at the prospect of a man being sentenced to death on the basis of the color of his skin. Perhaps the Court is slightly less troubled by the prospect of a racially motivated conviction unaccompanied by the death penalty, and I suppose that if, for some unimaginable reason, I had to choose between the two cases, and could only rectify one, I would remedy the case where death had been imposed. But there is no need to choose between the two cases. To state what seems to me obvious, the constitutional right implicated is the right to be judged by an impartial jury, regardless of the sentence, and the constitutional focus thus belongs on whether there is a likelihood of bias, and not on what flows from that bias. In *Ham* v. *South Carolina*, 409 U. S. 524 (1973), we reversed the conviction of a young black man who was charged with and convicted of possession of marijuana; because the man was known in the community as a civil rights activist, and because we were persuaded that racial issues were inextricably bound up with the conduct of the trial, we concluded that it was likely that any prejudice that individual members of the jury might harbor would be intensified and held that under those circumstances the trial judge was required to oblige the defense request to inquire into the jury's possible racial bias. We did not reject the petitioner's claim in that case because he was sentenced only to 18 months' imprisonment. Surely one has a right to an impartial jury whether one is subject to punishment for a day or a lifetime.

The Court may believe that it is being Solomonic in "splitting the difference" in this case and granting petitioner a new sentencing hearing while denying him the other "half" of the relief demanded. Starkly put, petitioner "wins" in that he gets to be resentenced, while the State "wins" in that it does not lose its conviction. But King Solomon did not, in fact, split the baby in two, and had he done so, I suspect that he would be remembered less for his wisdom than for his hardheartedness. Justice is not served by compromising principles in this way. I would reverse the conviction as well as the sentence in this case to insure compliance with the constitutional guarantee of an impartial jury.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, concurring in the judgment in part and dissenting in part.

For the reasons stated in my opinion in *Ross* v. *Massachusetts*, 414 U. S. 1080 (1973) (dissenting from denial of certiorari), I believe that a criminal defendant is entitled to inquire on *voir dire* about the potential racial bias of jurors whenever the case involves a violent interracial crime. As the Court concedes, "it is plain that there is some risk of racial prejudice influencing a jury whenever there is a crime involving interracial violence." *Ante*, at 36, n. 8. To my mind that risk plainly outweighs the slight cost of allowing the defendant to choose whether to make an inquiry concerning such possible prejudice. This Court did not identify in *Ristaino* v. *Ross*, 424 U. S. 589 (1976), nor does it identify today, any additional burdens that would accompany such a rule. I therefore cannot agree with the Court's continuing rejection of the simple prophylactic rule proposed in *Ristaino*.

Even if I agreed with the Court that a *per se* rule permitting inquiry into racial bias is appropriate only in capital cases, I could not accept the Court's failure to remedy the denial of such inquiry in this capital case by reversing petitioner's conviction. Henceforth any capital defendant accused of an interracial crime may inquire into racial prejudice on *voir dire*. When, as here, the same jury sits at the guilt phase and the penalty phase, these defendants will be assured an impartial jury at both phases. Yet petitioner is forced to accept a conviction by what may have been a biased jury. This is an incongruous and fundamentally unfair result. I therefore concur only in the Court's judgment vacating petitioner's sentence, and dissent from the Court's refusal to reverse the conviction as well.

JUSTICE POWELL, with whom JUSTICE REHNQUIST joins, dissenting.

The Court today adopts a *per se* rule applicable in capital cases, under which "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." *Ante*, at 36–37. This rule is certain to add to the already heavy burden of habeas petitions filed by prisoners under sentence of death[1] without affording any real protection beyond that provided by our decisions in *Ham* v. *South Carolina*, 409 U. S. 524 (1973), and *Ristaino* v. *Ross*, 424 U. S. 589 (1976).

In effect, the Court recognizes a presumption that jurors who have sworn to decide the case impartially nevertheless are racially biased. Such a presumption is flatly contrary to our decisions in *Ristaino* v. *Ross*, *supra*, and *Rosales-Lopez* v. *United States*, 451 U. S. 182, 190 (1981).[2] The facts of this case demonstrate why it is unnecessary and unwise for this Court to rule, as a matter of constitutional law, that a trial judge *always* must inquire into racial bias in a capital case involving an interracial murder, rather than leaving that decision to be made on a case-by-case basis.[3] Before today the facts that a defendant is black and his victim was white were insufficient to raise "a constitutionally significant likelihood that, absent questioning about racial prejudice," an impartial jury would not be seated. *Ristaino* v. *Ross*, *supra*, at 596.

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[1] This case has traveled through each layer of review provided to capital defendants in our state and federal systems. On July 12, 1978, petitioner committed the murder underlying this petition. Trial commenced on December 3, 1979, and the jury convicted petitioner on capital murder and other charges on December 4, 1979. Following the jury's recommendation, the trial judge sentenced petitioner to death on February 6, 1980. The Supreme Court of Virginia affirmed the convictions and sentences. *Turner* v. *Commonwealth*, 221 Va. 513, 273 S. E. 2d 36 (1980). This Court denied a petition for a writ of certiorari. 451 U. S. 1011 (1981). Petitioner then filed a petition for a writ of habeas corpus in the Circuit Court for the County of Southampton. That court denied relief, and the Supreme Court of Virginia denied review. We denied a petition for a writ of certiorari. *Turner* v. *Morris*, 462 U. S. 1112 (1983). Then, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia. By order entered May 23, 1984, the District Court denied the writ. The Court of Appeals for the Fourth Circuit affirmed. *Turner* v. *Bass*, 753 F. 2d 342 (1985). This Court granted certiorari, 471 U. S. 1096 (1985), and today reverses.

[2] "Although *Ristaino* involved an alleged criminal confrontation between a black assailant and a white victim, that fact pattern alone did not create a need of 'constitutional dimensions' to question the jury concerning racial prejudice. 424 U. S., at 596, 597. There is no constitutional presumption of juror bias for or against members of any particular racial or ethnic groups. As *Ristaino* demonstrates, there is no *per se* constitutional rule in such circumstances requiring inquiry as to racial prejudice. *Id.*, at 596, n. 8. Only when there are more substantial indications of the likeli-

I

Nothing in this record suggests that racial bias played any role in the jurors' deliberations. The relevant circumstances merit emphasis because they demonstrate that the fact of an interracial murder, by itself, does not create a substantial likelihood that racial issues can be expected to distort capital sentencing trials. Without further evidence that race can be expected to be a factor in such trials, there is no justification for departing from the rule of *Ham* and *Ristaino*.

Petitioner committed murder in the course of an armed robbery of a jewelry store in Franklin, Virginia. The murder was brutal. Petitioner shot the store's proprietor three

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hood of racial or ethnic prejudice affecting the jurors in a particular case does the trial court's denial of a defendant's request to examine the jurors' ability to deal impartially with this subject amount to an unconstitutional abuse of discretion." *Rosales-Lopez* v. *United States*, 451 U. S., at 190 (plurality opinion). Although JUSTICE WHITE's opinion in *Rosales-Lopez* was for a plurality, JUSTICE REHNQUIST's opinion concurring in the result was entirely consistent with the foregoing language.

[3] "Despite its importance, the adequacy of *voir dire* is not easily subject to appellate review. The trial judge's function at this point in the trial is not unlike that of the jurors later on in the trial. Both must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and of responses to questions. See *Ristaino* v. *Ross*, 424 U. S. 589, 595 (1976), quoting *Rideau* v. *Louisiana*, 373 U. S. 723, 733 (1963) (Clark, J., dissenting). In neither instance can an appellate court easily second-guess the conclusions of the decisionmaker who heard and observed the witnesses." *Id.*, at 188.

times. The first shot did not kill, but caused the victim to fall helplessly to the floor, bleeding from a scalp wound. A police officer, who had arrived in answer to a silent alarm, pleaded with petitioner not to shoot again. But petitioner fired two more shots into his victim's chest, causing his death. The officer then managed to subdue and arrest petitioner. At trial, the evidence of petitioner's guilt was conclusive.[4] Because the local media gave the murder extensive publicity, petitioner requested and was granted a change of venue from Southampton County to Northampton County, across the Chesapeake Bay, some 80 miles away from the location of the murder. No member of the jury empaneled had read or heard about the murder.

Virginia law vests the trial judge with the responsibility to conduct *voir dire* examination of prospective jurors. *Turner* v. *Commonwealth*, 221 Va. 513, 519–522, 273 S. E. 2d 36, 40–42 (1980), cert. denied, 451 U. S. 1011 (1981). Ordinarily, the judge, rather than counsel, questions members of the venire to provide a basis for the exercise of challenges. In this case, in accordance with state practice, the judge permitted the parties to propose questions to be asked during *voir dire*. Counsel for petitioner submitted 15 questions. As the 10th question on his list, counsel requested the following:

> "'The defendant, Willie Lloyd Turner, is a member of the Negro race. The victim, W. Jack Smith, Jr., was a white Caucasian. Will those facts prejudice you against Willie Lloyd Turner or affect your ability to render a fair and impartial verdict based solely on the evidence?'" *Id.*, at 522, n. 8, 273 S. E. 2d, at 42, n. 8.[5]

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[4] At oral argument, counsel for petitioner conceded that there was no question as to his client's guilt. Tr. of Oral Arg. 47.

[5] In the event that the Court decides that this new rule is to be applied prospectively only, the result of this decision will be to require trial judges to ask prospective jurors this simplistic question on *voir dire*. Asking such a question in the absence of circumstances that make clear a need for

As support for this proposed question, petitioner's counsel referred only to certain studies that were subsequently placed in the record. The studies purported to show that a black defendant who murders a white person is more likely to receive the death penalty than other capital defendants, but the studies included no statistics concerning administration of the death penalty in Virginia. See *Turner* v. *Commonwealth*, *supra*, at 523, n. 9, 273 S. E. 2d, at 42, n. 9. Counsel then discussed their proposed questions with the judge. The prosecutor pointed out that the case presented no racial issues beyond the fact that petitioner and his victim were of different races.

The trial judge declined to ask the proposed question, but he did ask general questions designed to uncover bias. For example, the prospective jurors were asked, "Do any of you know any reason whatsoever why you cannot render a fair and impartial verdict in this case, either for the defendant or for the Commonwealth of Virginia?" Each juror responded negatively.[6] The jury of 12 persons ultimately empaneled included 4 black citizens, and a black juror was selected to act as foreman.

There is nothing in the record of this trial that reflects racial overtones of any kind. From *voir dire* through the close of trial, no circumstance suggests that the trial judge's refusal to inquire particularly into racial bias posed "an impermissible threat to the fair trial guaranteed by due process." *Ristaino* v. *Ross*, 424 U. S., at 595. The Court does not purport to identify any such circumstance, or to explain why the facts that a capital defendant is of one race and his victim of

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it could well have the negative effect of suggesting to the jurors that race somehow is relevant to the case.

[6] As the facts of *Ristaino* v. *Ross* demonstrate, such a general question can prompt a juror who is aware of the defendant's race, as the jurors were in this case, to admit to racial bias. 424 U. S., at 593, and n. 5. This general inquiry into bias does not have the undesirable result of suggesting to the jurors that race is relevant to the issues in the case.

another now create a significant likelihood that racial issues will distort the jurors' consideration of the issues in the trial. *Id.*, at 597. This case illustrates that it is unnecessary for the Court to adopt a *per se* rule that constitutionalizes the unjustifiable presumption that jurors are racially biased.

II

Until today a trial judge committed an unconstitutional abuse of discretion by refusing to inquire into racial prejudice only when the defendant showed that racial issues "were inextricably bound up with the conduct of the trial."[7] *Ristaino* v. *Ross*, 424 U. S., at 597. When a defendant makes such a showing, there is an unacceptable risk that racial prejudice will "distort the trial." *Ibid.* Under such circumstances, therefore, due process requires "a *voir dire* that include[s] questioning specifically directed to racial prejudice." *Ibid.*; *Ham* v. *South Carolina*, 409 U. S., at 526–527. In *Ristaino*, however, the Court expressly declined to adopt a *per se* rule requiring *voir dire* inquiry into racial bias in every trial for an interracial crime. Neither the Constitution nor sound policy considerations supported such a *per se* approach.[8] But today the Court decides that the Constitution does require a *per se* rule in capital cases because the capital jury exercises discretion at the sentencing phase. The Court's reasoning ignores the many procedural and substantive safeguards, similar to those governing the jury's decision on guilt or innocence, that circumscribe the capital jury's sentencing decision.

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[7] The circumstances of *Ham* v. *South Carolina*, 409 U. S. 524 (1973), are illustrative. There, a black defendant was tried for possession of marijuana. The defendant was well known in the community where the case was tried for his civil rights activities, and the theory of his defense was that the police had framed him in retaliation for those activities. On those facts, the Court held that it was an unconstitutional abuse of discretion for the judge to refuse to inquire into racial prejudice. Not only were racial issues a central part of the trial, but also the defendant's "reputation as a civil rights activist and the defense he interposed were likely to intensify any prejudice that individual members of the jury might harbor." *Ristaino* v. *Ross*, 424 U. S., at 597.

[8] "In our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption—as a *per se* rule—that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion." *Id.*, at 596, n. 8.

Under Virginia law, murder is a capital offense only if it is "willful, deliberate and premeditated" and is committed while the perpetrator is engaged in another crime or under specified aggravating circumstances. Va. Code § 18.2–31 (Supp. 1985). As in any criminal prosecution, of course, the State carries the burden of proving all elements of the capital offense beyond a reasonable doubt. Following a sentencing hearing, the death sentence may not be imposed unless the State proves beyond a reasonable doubt statutorily defined aggravating factors. Virginia law recognizes only two aggravating factors: whether, based on the defendant's criminal record, there is a probability that he would commit future crimes of violence, and whether the defendant's crime was "outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim."[9] Va. Code §§ 19.2–264.2, 19.2–264.4 (1983). The jury also is required to consider any relevant mitigating evidence offered by the defendant.

The existence of these significant limitations on the jury's exercise of sentencing discretion illustrates why the Court's *per se* rule is wholly unfounded. Just as the trial judge's charge at the guilt phase instructs the jurors that they may consider only the evidence in the case and that they must determine if the prosecution has established each element of the crime beyond a reasonable doubt, the charge at the penalty phase directs the jurors to focus solely on considerations relevant to determination of appropriate punishment and to decide if the prosecution has established beyond a reasonable doubt factors warranting imposition of death. Accordingly, just as there is no reason to presume racial bias on the part of jurors who determine the guilt of a defendant who has committed a violent crime against a person of another race, there is no reason to constitutionalize such a presumption with respect to the jurors who sit to recommend the penalty in a capital case.

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[9] The Supreme Court of Virginia properly has given the "vileness" clause a limiting construction to ensure that the jury's discretion in recommending capital punishment is channeled by appropriate standards. See *Godfrey* v. *Georgia*, 446 U. S. 420 (1980). Sentence of death may be imposed on the basis of this aggravating factor only if the State makes a two-pronged showing. First, the State must prove beyond a reasonable doubt that the defendant's conduct was " 'outrageously or wantonly vile, horrible or inhuman.' " *Turner* v. *Commonwealth*, 221 Va., at 526, 273 S. E. 2d, at 44–45. Second, the State must prove beyond a reasonable doubt "torture of the victim, an aggravated battery of the victim, or the perpetrator's depravity of mind." *Id.*, at 526, 273 S. E. 2d, at 45.

Nor does anything in the circumstances of this jury's recommendation of the death penalty suggest a likelihood that sentencing decisions are being made on racial grounds so as to justify adoption of a *per se* rule. There is no question that the State proved the existence of the first aggravating factor beyond a reasonable doubt. As the Supreme Court of Virginia noted, since 1974 petitioner "has been convicted of malicious maiming, escape, unlawful wounding, malicious wounding, and second-degree murder. Four of these offenses occurred in the penal system." *Turner* v. *Commonwealth*, 221 Va., at 525, n. 11, 273 S. E. 2d, at 44, n. 11. The court also expressly found that petitioner's criminal record was "one of the most extensive" it had reviewed in a capital case. *Id.*, at 531, 273 S. E. 2d, at 47. The court further observed that, although the first aggravating factor plainly supported the recommendation of death, the circumstances of this crime were "vile" because petitioner had committed an aggravated battery on his victim. *Id.*, at 527, 273 S. E. 2d, at 45.

Under the foregoing circumstances, there is no basis for concluding that the jury's sentencing decision was tainted by racial bias. The mere fact that the sentencing decision, after the jury had found guilt and the existence of aggravating factors beyond a reasonable doubt, involved an element of discretion provides no ground for this Court to presume that the decision was infected by racial prejudice. Instead, the rule that until today afforded due process required petitioner to establish that some special circumstances in *his* case, beyond the fact of an interracial crime, raised a constitutionally significant likelihood that racial prejudice would taint the proceedings. *Ristaino* v. *Ross*, 424 U. S., at 596. The Court rejects that rule, and adopts a singularly unwise and unjustified presumption that capital jurors harbor latent racial bias.

III

The *per se* rule announced today may appear innocuous. But the rule is based on what amounts to a constitutional presumption that jurors in capital cases are racially biased. Such presumption unjustifiably suggests that criminal justice in our courts of law is meted out on racial grounds. It is not easy to reconcile the Court's holding today with the principles announced and applied in *Ham* v. *South Carolina*, *Ristaino* v. *Ross*, and *Rosales-Lopez* v. *United States*.[10] The manner in which petitioner was tried and sentenced, and particularly the jurors who fulfilled their civic duty to sit in his case, reflected not a trace of the racial prejudice that the Court's new rule now presumes.

For these reasons, I dissent.

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[10] The Court's opinion purports to reaffirm *Ristaino* v. *Ross*, *ante*, at 35, n. 7, and would distinguish all three of the above-cited decisions on the ground that none of them was a capital case. The decision today cannot be reconciled with the reasoning of *Ristaino* and *Rosales-Lopez* in which we expressly held that the Constitution does not require *voir dire* questioning on racial bias unless the defendant proves additional circumstances beyond the fact that the case involves an interracial crime. Moreover, those two cases rejected any constitutional presumption that jurors are racially biased.

DIAMOND ET AL. *v.* CHARLES ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 84–1379. Argued November 5, 1985—Decided April 30, 1986

Appellee physicians, who provide abortion services in Illinois, filed a class action in Federal District Court challenging the constitutionality of the Illinois Abortion Law of 1975, as amended, and seeking declaratory and injunctive relief. Appellant pediatrician (hereafter appellant) filed a motion to intervene as a party defendant based on his conscientious objection to abortions and on his status as a pediatrician and as a parent of a minor daughter. The District Court granted the motion without indicating whether the intervention was permissible or as of right. Ultimately, the District Court permanently enjoined the enforcement of certain provisions of the law that impose criminal liability upon physicians for violation of the prescribed standards of care for performing abortions and the requirements for furnishing a patient with particular abortion-related information. The Court of Appeals affirmed and also permanently enjoined the enforcement of another related provision. The State did not appeal to this Court, but filed a "letter of interest" under this Court's Rule 10.4, stating that its interest was identical to that advanced by it in the lower courts and essentially coterminous with appellant's position.

Held: Because appellant lacks any judicially cognizable interest in the Illinois Abortion Law, his appeal is dismissed for want of jurisdiction. Pp. 61–71.

(a) The presence of a disagreement is insufficient by itself to meet Art. III's "case" or "controversy" requirement. The party seeking judicial resolution of a dispute must also show that he personally suffered some actual or threatened injury as a result of the other party's allegedly illegal conduct. Pp. 61–62.

(b) Illinois' "letter of interest" is insufficient to bring the State into the suit as an appellant with standing to defend the statute's constitutionality in this Court. While the State, as a party below, remains a party under Rule 10.4, that status does not equate with the status of appellant. The State's failure to invoke this Court's jurisdiction leaves the Court without a "case" or "controversy" between appellee physicians and the State. Pp. 62–64.

(c) Appellant's interests in enforcement of the statute do not permit him to defend it. Only the State has a judicially cognizable interest in defending its criminal statutes. Pp. 64–65.

(d) Appellant's claims that his professional interests confer standing have no merit. As a pediatrician he has an interest, but no direct stake, in the abortion process. This abstract concern does not substitute for the concrete injury required by Art. III. Similarly, appellant's claim of conscientious objection to abortion does not provide a judicially cognizable interest. Nor can he maintain the appeal in his capacity as a parent, absent any showing that his daughter is currently a minor or otherwise incapable of asserting her own rights. And he cannot assert any constitutional right of the unborn fetus, since only the State may invoke regulatory measures to protect that interest or the power of the courts when those measures are subject to challenge. Pp. 65–67.

(e) Neither appellant's status as an intervenor below, whether permissive or as of right, nor the fact that the District Court assessed attorney's fees against him and the State, confers standing to keep the case alive in the absence of the State on this appeal. An intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon the intervenor's showing that he satisfies Art. III's requirements, and appellant has not made such a showing. As to the fee award, Art. III standing requires an injury with a nexus to the substantive character of the statute at issue, and the fee award bears no relation to the Illinois Abortion Law. Pp. 68–71.

Appeal dismissed. Reported below: 749 F. 2d 452.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, POWELL, and STEVENS, JJ., joined, and in Part I of which BURGER, C. J., and REHNQUIST and O'CONNOR, JJ., joined. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 71. WHITE, J., concurred in the judgment.

Dennis J. Horan argued the cause for appellants. With him on the briefs were *Victor G. Rosenblum*, *Edward R. Grant*, and *Maura K. Quinlan*.

R. Peter Carey argued the cause for appellees. With him on the brief were *Colleen K. Connell*, *Frank Susman*, *Janet Benshoof*, and *Nan D. Hunter*.*

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Acting Solicitor General Fried*, *Acting Assistant Attorney General Willard*, *Deputy Assistant Attorney General Kuhl*, *John F. Cordes*, and *John*

JUSTICE BLACKMUN delivered the opinion of the Court.

Appellant Eugene F. Diamond is a pediatrician engaged in private practice in Illinois. He seeks to defend before this Court the constitutionality of four sections of the Illinois Abortion Law of 1975, as amended.[1] These sections impose criminal liability for the performance of an abortion under certain circumstances, and, under other circumstances, require that the woman be provided with particular abortion-related information. The State of Illinois has chosen to absent itself from this appeal, despite the fact that its statute is at stake. Because a private party whose own conduct is neither implicated nor threatened by a criminal statute has no judicially cognizable interest in the statute's defense, we dismiss the appeal for want of jurisdiction.

M. Rogers; for the Catholic League for Religious and Civil Rights by *Steven Frederick McDowell;* and for Senator Gordon J. Humphrey et al. by *Robert A. Destro* and *Basile J. Uddo.*

Briefs of *amici curiae* urging affirmance were filed for the Attorney General of New York by *Robert Abrams, pro se, Robert Hermann,* Solicitor General, *Rosemarie Rhodes,* Assistant Attorney General, and *Lawrence S. Kahn, Sanford M. Cohen,* and *Martha J. Olson,* Assistant Attorneys General; for the American Medical Association et al. by *Benjamin W. Heineman, Jr., Carter G. Phillips, Newton N. Minow, Jack R. Bierig, Stephan E. Lawton, Joel I. Klein, Joseph A. Keyes, Jr.,* and *Ann E. Allen;* for the Center for Constitutional Rights et al. by *Anne E. Simon, Nadine Taub, Rhonda Copelon,* and *Judith Levin;* for the National Abortion Rights Action League et al. by *Lynn I. Miller;* for the National Organization for Women et al. by *Diane E. Thompson;* and for Planned Parenthood Federation of America, Inc., et al. by *Dara Klassel* and *Eve W. Paul.*

Briefs of *amici curiae* were filed for the Women Lawyers' Association of Los Angeles et al. by *Susan R. Schwartz, Carol Boyk, Judith Gordon,* and *Lorraine Loder;* for the Unitarian Universalist Association et al. by *Madeline Kochen;* for Senator Bob Packwood et al. by *Laurence H. Tribe* and *Kathleen M. Sullivan;* and for Susan Bandes et al. by *Arthur Kinoy.*

[1] 1975 Ill. Laws, Pub. Act 79–1126, as amended, now codified as Ill. Rev. Stat., ch. 38, ¶¶81–21 to 81–34 (1983). The 1975 Act was passed over the Governor's veto. Substantial portions of it already have been held to be unconstitutional. See, *e. g., Wynn* v. *Scott,* 449 F. Supp. 1302 (ND Ill. 1978), aff'd *sub nom. Wynn* v. *Carey,* 599 F. 2d 193 (CA7 1979).

I

On October 30, 1979, over gubernatorial veto, the Illinois Legislature amended the State's 1975 Abortion Law to provide for increased regulation. 1979 Ill. Laws, Pub. Act 81–1078. That very day appellees, four physicians who provide obstetric, gynecologic, and abortion services in Illinois, filed a class action in the United States District Court for the Northern District of Illinois. They alleged a deprivation of rights in violation of 42 U. S. C. § 1983 by the Illinois officials charged with enforcing the Abortion Law.[2] Appellees sought declaratory and injunctive relief.[3]

The next day, the District Court certified the plaintiff class and temporarily restrained enforcement of the entire statute. On November 8, appellant Diamond filed a motion to intervene as a party defendant, either permissively or as of right, and to be appointed guardian ad litem for fetuses who survive abortion.[4] The motion for intervention professed to be based on Doctor Diamond's conscientious objection to abortions, and on his status as a pediatrician and as a parent of an unemancipated minor daughter.[5]

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[2] The defendants named in the complaint were the Attorney General of the State and the Director of the Illinois Department of Public Health, each in his official capacity, and the State's Attorney of Cook County, in both his official capacity and as representative of a class consisting of the State's Attorneys in all the counties of the State of Illinois. A suit against a state officer in his official capacity is, of course, a suit against the State. See *Kentucky* v. *Graham*, 473 U. S. 159, 165–166 (1985). The District Court certified a defendant class of State's Attorneys. *Charles* v. *Carey*, Civ. No. 79C 4541 (Oct. 31, 1979).

[3] On the same day another and similar action was filed in the same court by three other Illinois obstetrician-gynecologists and two Illinois clinics that provide abortion services. The two suits were consolidated by court order on Nov. 14, 1979.

[4] Doctor Diamond's motion to intervene and for appointment of guardian was joined by Doctor Jasper F. Williams and David K. Campbell. Doctor Williams, a physician engaged in private practice in Illinois, in the alternative sought appointment as guardian ad litem for unborn children subject to abortion. We are advised that Doctor Williams died on April 15, 1985, after the filing of the notice of appeal to this Court. No one has been substituted for him. Mr. Campbell, who sought intervention as the spouse of a woman of childbearing age, did not file or join a notice of appeal to this Court.

Over appellees' objection, the District Court granted Diamond's motion to intervene.[6] The District Court did not indicate whether the intervention was permissive or as of right, and it did not describe how Diamond's interests in the litigation satisfied the requirements of Federal Rule of Civil Procedure 24 for intervenor status. The court denied the guardianship motion.

On November 16, the District Court entered a preliminary injunction against a number of sections of the Abortion Law, including §§6(1) and 6(4).[7] These sections prescribe the standard of care that must be exercised by a physician in performing an abortion of a viable fetus,[8] and of a possibly viable fetus.[9] A violator of § 6(1) is subject to a term of imprisonment of between three and seven years and a fine not exceeding $10,000. Ill. Rev. Stat., ch. 38, ¶¶ 1005–8–1(5) and 1005–9–1(1) (1983). A violator of § 6(4) is subject to a term of imprisonment of between two and five years and a fine not exceeding $10,000. Ill. Rev. Stat., ch. 38, ¶¶ 1005–8–1(6) and 1005–9–1(1) (1983).

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[5] Diamond claimed that under the Abortion Law as a whole fewer abortions would be performed, and that those performed in accordance with the Abortion Law would be designed to preserve the life of aborted fetuses, resulting in more live births. Diamond also rested his motion for intervention on § 13 of the Abortion Law, which provides that a physician who refuses to perform abortions based on conscientious objections will not be subject to liability. He relied, furthermore, on § 11(1), to the effect that violations of the Abortion Law constitute unprofessional conduct, and on § 3.3, which provides for parental consultation.

[6] Although the motion to intervene was on behalf of Doctor Diamond, Doctor Williams, and Mr. Campbell, see n. 4, *supra*, the District Court granted leave to intervene to Americans United for Life Legal Defense Fund, counsel for the intervenors below and for Diamond before this Court.

[7] The preliminary injunction also applied to the following sections: § 2(2) (defining "viability"); § 3.3 (parental consultation); § 3.4 (spousal consultation); § 3.5(2), in part (the portion requiring that the patient be told, *inter alia:* "The State of Illinois wants you to know that in its view the child you are carrying is a living human being whose life should be preserved. Illinois strongly encourages you not to have an abortion but to go through to childbirth"); § 4 (abortion subsequent to first trimester); §§ 5(1), (2), and (3) (definition of "viability"); § 9 (prohibition of saline amniocentesis after first trimester); § 10(i) (certification as to nonviability or as to medical indicators for abortion when fetus was viable); § 10(j) (reporting requirements for saline amniocentesis); § 10(*l*), in part (the reporting requirement as to the basis for a judgment concerning the existence of a medical emergency); and

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§ 12, in part (the third sentence, prohibiting experimentation with or exploitation of fetal tissue).

[8] Section 6(1) then provided:

"No person who intentionally terminates a pregnancy after the fetus is known to be viable shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in such a pregnancy termination who shall intentionally fail to take such measures to encourage or to sustain the life of a fetus known to be viable before or after birth, commits a Class 2 felony if the death of a viable fetus or infant results from such failure." Ill. Rev. Stat., ch. 38, ¶ 81–26 (1983).

On June 30, 1984, the Illinois Legislature amended § 6(1), overriding another veto of the Governor. 1984 Ill. Laws, Pub. Act 83–1128, § 1. The Court of Appeals addressed the constitutionality of § 6(1) as it appeared prior to the 1984 amendment. See *Charles* v. *Daley*, 749 F. 2d 452, 455 (CA7 1984).

[9] Section 6(4) then provided:

"No person who intentionally terminates a pregnancy shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted when there exists, in the medical judgment of the physician performing the pregnancy termination based on the particular facts of the case before him, a possibility known to him of sustained survival of the fetus apart from the body of the mother, with or without artificial support. Any physician or person assisting in such pregnancy termination who shall intentionally fail to take such measures to encourage or sustain the life of such a fetus, before or after birth, is guilty of a Class 3 felony if the death of a viable fetus or an infant results from such failure." Ill. Rev. Stat., ch. 38, ¶ 81–26 (1983).

Section 6(4) was amended by the 1984 statute cited in n. 8, *supra*, but the Court of Appeals assessed its constitutionality on the version quoted above. See *Charles* v. *Daley*, 749 F. 2d, at 455.

The plaintiffs appealed the denial of the preliminary injunction as to § 2(10), which defines the term "abortifacient,"[10] and as to § 11(d), which requires a physician who prescribes an abortifacient to tell the patient what it is.[11] A violator of § 11(d) is subject to a term of imprisonment of not more than 30 days, and a fine not exceeding $500. Ill. Rev. Stat., ch. 38, ¶¶ 1005–8–3(3) and 1005–9–1(3) (1983). No cross-appeal was taken. The Court of Appeals for the Seventh Circuit instructed the District Court to enter a preliminary injunction as to §§ 2(10) and 11(d), because these statutory provisions forced physicians "to act as the mouthpiece for the State's theory of life." *Charles* v. *Carey*, 627 F. 2d 772, 789 (1980).[12]

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[10] Section 2(10) provides:

"'Abortifacient' means any instrument, medicine, drug, or any other substance or device which is known to cause fetal death when employed in the usual and customary use for which it is manufactured, whether or not the fetus is known to exist when such substance or device is employed." Ill. Rev. Stat., ch. 38, ¶ 81–22 (1983).

[11] Section 11(d) provides in relevant part:

"Any person who prescribes or administers any instrument, medicine, drug or other substance or device, which he knows to be an abortifacient, and which is in fact an abortifacient, and intentionally, knowingly or recklessly fails to inform the person for whom it is prescribed or upon whom it is administered that it is an abortifacient commits a Class C misdemeanor." Ill. Rev. Stat., ch. 38, ¶ 81–31 (1983).

[12] The Court of Appeals instructed the District Court also to enter a preliminary injunction against the following sections: § 3.2(A)(1)(a)(iii); § 3.5(2); § 6(6); § 3.2(A)(1)(a) (defining the terms "by the physician who is to perform the abortion" and "the woman is provided at least 24 hours before the abortion"); § 3.2(A)(1)(b) (defining the term "from the physician at least 24 hours before the abortion is to be performed"); § 3.2(B)(1) (waiver of waiting period); § 10(k) (reporting requirement for waiver of waiting period); § 3.2(A)(1)(a) (defining the term "with a true copy of her pregnancy test result"); and § 6(2). See 627 F. 2d, at 792, and n. 36.

On remand, the District Court permanently enjoined, among others, §§6(4), 2(10), and 11(d). *Charles* v. *Carey*, 579 F. Supp. 464 (1983).[13] On appeal and cross-appeal, the Court of Appeals affirmed the entry of the permanent injunction as to the three sections, and also permanently enjoined the enforcement of §6(1). 749 F. 2d 452 (1984). The State did not appeal the grant of the permanent injunction. Diamond, however, filed a notice of appeal to this Court and a jurisdictional statement. As we have indicated, see n. 4, *supra*, Doctor Diamond is the sole appellant here. We noted probable jurisdiction. 471 U. S. 1115 (1985).

The State, through the office of its Attorney General, subsequently filed with this Court a "letter of interest," invoking our Rule 10.4, which provides: "All parties to the proceeding in the court from whose judgment the appeal is being taken shall be deemed parties in this Court . . . ." In that letter Illinois stated:

> "Although not an appellant, the Office of the Attorney General . . . is a party in the United States Supreme Court and is designated an appellee. The Illinois Attorney General's interest in this proceeding is identical to that advanced by it in the lower courts and is essentially co-terminous with the position on the issues set forth by the appellants." Letter dated July 15, 1985, to the Clerk of the Court from the Director of Advocacy, Office of the Attorney General of Illinois.

See App. to Reply Brief for Appellants A-1. Illinois' absence as an appellant requires that we examine our jurisdiction to entertain this appeal.

II

Article III of the Constitution limits the power of federal courts to deciding "cases" and "controversies." This requirement ensures the presence of the "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U. S. 186, 204 (1962). The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements. This Court consistently has required, in addition, that the party seeking judicial resolution of a dispute "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct" of the other party. *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 99 (1979); see also *Warth* v. *Seldin*, 422 U. S. 490, 501 (1975).

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[13] Other sections of the Abortion Law had been preliminarily enjoined under a separate opinion by the District Court following remand. See *Charles* v. *Carey*, 579 F. Supp. 377 (1983).

The nature of the injury is central to the Art. III inquiry, because standing also reflects a due regard for the autonomy of those most likely to be affected by a judicial decision. "The exercise of judicial power . . . can so profoundly affect the lives, liberty, and property of those to whom it extends," *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 473 (1982), that the decision to seek review must be placed "in the hands of those who have a direct stake in the outcome." *Sierra Club* v. *Morton*, 405 U. S. 727, 740 (1972). It is not to be placed in the hands of "concerned bystanders," who will use it simply as a "vehicle for the vindication of value interests." *United States* v. *SCRAP*, 412 U. S. 669, 687 (1973).

III

Had the State of Illinois invoked this Court's appellate jurisdiction under 28 U. S. C. § 1254(2) and sought review of the Court of Appeals' decision, the "case" or "controversy" requirement would have been met, for a State has standing to defend the constitutionality of its statute. Diamond argues that Illinois' "letter of interest" demonstrates the State's continued concern with the enforcement of its Abortion Law, and renders the State the functional equivalent of an appellant. Accordingly, Diamond asserts, there is no jurisdictional problem in the case. This claim must be rejected.

It is true that, as a party below, the State remains a party here under our Rule 10.4.[14] But status as a "party" does not equate with status as an appellant. To appear before the Court as an appellant, a party must file a notice of appeal, the statutory prerequisite to invoking this Court's jurisdiction. See 28 U. S. C. §2101(c).[15] Illinois' mere expression of interest is insufficient to bring the State into the suit as an appellant. By not appealing the judgment below, the State indicated its acceptance of that decision, and its lack of interest in defending its own statute.[16] The State's general interest may be adverse to the interests of appellees, but its failure to invoke our jurisdiction leaves the Court without a "case" or "controversy" between appellees and the State of Illinois. Cf. *Princeton University* v. *Schmid*, 455 U. S. 100 (1982).

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[14] The purpose of the Rule is to provide a means for a party below, who was not notified that this Court's review has been sought by another party, to make its interests known to the Court. Frequently, an appellant would seek review as to only one party below, permitting the judgment to stand as to others. See R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice § 6.20 (6th ed. 1986), and § 6.35 (3d ed. 1962) (describing evolution of the Rule). This Court's Rule 10.4 therefore avoids the adjudication of rights in a party's absence, but it does not provide a means to obtain review in the absence of the filing of a notice of appeal by a proper party.

[15] Title 28 U. S. C. §2101(c) provides: "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree."

[16] The State's reasons for abandoning this suit are not articulated in the record. We have noted above, however, that, during the pendency of this case before the Court of Appeals, Illinois again amended its Abortion Law. 1984 Ill. Laws, Pub. Act 83-1128. At the time of the Court of Appeals' decision, which was based on the preamendment version of the Abortion Law, the amended sections were subject to a temporary restraining order. See *Keith* v. *Daley*, No. 84 C 5602 (ND Ill. 1984). The Court of Appeals declined to assess the constitutionality of the 1984 amendments and rejected challenges of mootness based on those amendments. *Charles* v. *Daley*, 749 F. 2d, at 455, 457–458. The State's inaction may well be due to its concern with the amended, not the earlier, form of the statutes under attack.

Had the State sought review, this Court's Rule 10.4 makes clear that Diamond, as an intervening defendant below, also would be entitled to seek review, enabling him to file a brief on the merits, and to seek leave to argue orally. But this ability to ride "piggyback" on the State's undoubted standing exists only if the State is in fact an appellant before the Court; in the absence of the State in that capacity, there is no case for Diamond to join.

IV

A

Diamond claims that his interests in enforcement permit him to defend the Abortion Law, despite Illinois' acquiescence in the Court of Appeals' ruling of unconstitutionality. This claim also must fail. Doctor Diamond attempts to equate his position with that of appellees, the physicians who instituted this suit in the District Court. Appellees, however, had standing to bring suit against the state officials who were charged with enforcing the Abortion Law because appellees faced possible criminal prosecution. See, *e. g.*, *Doe* v. *Bolton*, 410 U. S. 179, 188 (1973). The conflict between state officials empowered to enforce a law and private parties subject to prosecution under that law is a classic "case" or "controversy" within the meaning of Art. III.

The conflict presented by Diamond is different. Were the Abortion Law to be held constitutional, Diamond could not compel the State to enforce it against appellees because "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 619 (1973); see *Leeke* v. *Timmerman*, 454 U. S. 83 (1981); *Sure-Tan, Inc.* v. *NLRB*, 467 U. S. 883 (1984). See also *Younger* v. *Harris*, 401 U. S. 37, 42 (1971); *Bailey* v. *Patterson*, 369 U. S. 31, 33 (1962). Cf. *Allen* v. *Wright*, 468 U. S. 737, 754 (1984) ("[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court").

The concerns for state autonomy that deny private individuals the right to compel a State to enforce its laws apply with even greater force to an attempt by a private individual to compel a State to create and retain the legal framework within which individual enforcement decisions are made. The State's acquiescence in the Court of Appeals' determination of unconstitutionality serves to deprive the State of the power to prosecute anyone for violating the Abortion Law. Diamond's attempt to maintain the litigation is, then, simply an effort to compel the State to enact a code in accord with Diamond's interests. But "the power to create and enforce a legal code, both civil and criminal" is one of the quintessential functions of a State. *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U. S. 592, 601 (1982). Because the State alone is entitled to create a legal code, only the State has the kind of "direct stake" identified in *Sierra Club* v. *Morton*, 405 U. S., at 740, in defending the standards embodied in that code.

B

Even if there were circumstances in which a private party would have standing to defend the constitutionality of a challenged statute,[17] this is not one of them. Diamond is not able to assert an injury in fact. A physician has standing to challenge an abortion law that poses for him a threat of criminal prosecution. *Doe* v. *Bolton*, 410 U. S., at 188; see *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 62 (1976). In addition, a physician who demonstrates that abortion funding regulations have a direct financial impact on his practice may assert the constitutional rights of other individuals who are unable to assert those rights themselves. See *Singleton* v. *Wulff*, 428 U. S. 106 (1976). Diamond attempts to assert an equivalent interest based upon his personal status as a doctor, a father, and a protector of the unborn. We must reject Diamond's claims that his personal and professional interests confer standing.

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[17] The Illinois Legislature, of course, has the power to create new interests, the invasion of which may confer standing. In such a case, the requirements of Art. III may be met. See *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 41, n. 22 (1976).

Diamond, who is a pediatrician, claims that if the Abortion Law were enforced, he would gain patients; fewer abortions would be performed and those that would be performed would result in more live births, because the law requires a physician to attempt to preserve the life of the aborted fetus. By implication, therefore, the pool of potential fee-paying patients would be enlarged. The possibilities that such fetuses would survive and then find their way as patients to Diamond are speculative, and "unadorned speculation will not suffice to invoke the federal judicial power." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 44 (1976). Diamond's situation, based on speculation and hoped-for fees is far different from that of the physicians in *Wulff*, *supra*, where actual fees were limited by the challenged Missouri statute.

Diamond also alleges that, as a physician, he has standing to litigate the standards of medical practice that ought to be applied to the performance of abortions.[18] Although Diamond's allegation may be cloaked in the nomenclature of a special professional interest, it is simply the expression of a desire that the Illinois Abortion Law as written be obeyed. Article III requires more than a desire to vindicate value interests. See *United States* v. *SCRAP*, 412 U. S., at 687. It requires an "'injury in fact'" that distinguishes "a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem." *Id.*, at 689, n. 14. Diamond has an interest, but no direct stake, in the abortion process. This "abstract concern . . . does not substitute for the concrete injury required by Art. III." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S., at 40. Similarly, Diamond's claim of conscientious objection to abortion does not provide a judicially cognizable interest.

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[18] Diamond's purported interest appears to rest on § 11(a) of the Abortion Law, which provides that the requirements of that law constitute the standards of conduct for the medical profession. Since that provision is neither before the Court nor integrally related to any of the sections at issue in this proceeding, it cannot confer standing on Diamond.

Doctor Diamond also asserts that he has standing as the father of a daughter of childbearing years. First, to the extent that Diamond's claim derives from § 3(3) of the Abortion Law, the parental notification section, he lacks standing to continue this litigation, for it does not address the validity of that provision. Second, to the extent that he claims an interest in ensuring that his daughter is not prescribed an abortifacient without prior information—a concern ostensibly triggered by the invalidation of §§ 2(10) and 11(d)—he has failed to show that he is a proper person to advance this claim on her behalf. Diamond has not shown either that his daughter is currently a minor or that she is otherwise incapable of asserting her own rights. Diamond's failure to adduce factual support renders him incapable of maintaining this appeal in his capacity as a parent. See *Bender* v. *Williamsport Area School Dist.*, 475 U. S. 534, 548–549 (1986).

Nor can Diamond assert any constitutional rights of the unborn fetus.[19] Only the State may invoke regulatory measures to protect that interest, and only the State may invoke the power of the courts when those regulatory measures are subject to challenge.

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[19] Diamond claims that he is asserting the rights of his prospective patients, who survive abortion, to be born with as few handicapping conditions as possible. Diamond asserted this claim before the District Court as a basis for appointment as guardian ad litem for unborn fetuses. That claim was rejected by the District Court.

V

Finally, Diamond asserts that he has standing based on two interests that relate not to the Abortion Law, but to his involvement in this litigation. Neither interest suffices.

A

Diamond's status as an intervenor below, whether permissive or as of right, does not confer standing sufficient to keep the case alive in the absence of the State on this appeal. Although intervenors are considered parties entitled, among other things, to seek review by this Court, *Mine Workers* v. *Eagle-Picher Mining & Smelting Co.*, 325 U. S. 335, 338 (1945), an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III. See *id.*, at 339. See also *Bryant* v. *Yellen*, 447 U. S. 352, 368 (1980).

This Court has recognized that certain public concerns may constitute an adequate "interest" within the meaning of Federal Rule of Civil Procedure 24(a)(2), see *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U. S. 129, 135 (1967), and has held that an interest under Rule 24(a)(2), which provides for intervention as of right,[20] requires a "significantly protectable interest." See *Donaldson* v. *United States*, 400 U. S. 517, 531 (1971). However, the precise relationship between the interest required to satisfy the Rule and the interest required to confer standing, has led to anomalous decisions in the Courts of Appeals.[21] We need not decide today whether a party seeking to intervene before a district court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art. III. To continue this suit in the absence of Illinois, Diamond himself must satisfy the requirements of Art. III. The interests Diamond asserted before the District Court in seeking to intervene plainly are insufficient to confer standing on him to continue this suit now.

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[20] Federal Rule of Civil Procedure 24(a)(2) provides for intervention

"when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

[21] The Courts of Appeals have reached varying conclusions as to whether a party seeking to intervene as of right must himself possess standing. Compare *United States* v. *39.36 Acres of Land*, 754 F. 2d 855, 859 (CA7

B

At oral argument, Diamond stated that the District Court has assessed attorney's fees against him and the State, jointly and severally. This fee award, Diamond asserted, provided the requisite standing to litigate this case:

> "The standing or the real controversy thus between the parties to this case is a very real sum of money, a judgment that runs in favor of the individual plaintiff physicians in this case and against the individual defendants intervenors whom I represent." Tr. of Oral Arg. 4.

Diamond is claiming that an award of fees entered after a decision on the merits by the District Court and the Court of Appeals, and after probable jurisdiction had been noted by this Court, gives him a direct stake in the enforcement of the Illinois Abortion Law. In short, because Diamond stands to lose the amount of the fee unless the State's regulations con-

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1985) (intervention requires an interest in excess of that required for standing), cert. pending *sub nom. Save the Dunes Council, Inc.* v. *United States*, No. 85–426, with *Southern Christian Leadership Conference* v. *Kelley*, 241 U. S. App. D. C. 340, 747 F. 2d 777 (1984) (equating interest necessary to intervene with interest necessary to confer standing), and *United States* v. *American Tel. & Tel. Co.*, 206 U. S. App. D. C. 317, 642 F. 2d 1285 (1980) (intervention is proper only if the would-be intervenor has an interest in the outcome of the suit different from that of the public as a whole), with *Sagebush Rebellion, Inc.* v. *Watt*, 713 F. 2d 525 (CA9 1983) (resolving intervention questions without reference to standing doctrine), and *Planned Parenthood of Minnesota, Inc.* v. *Citizens for Community Action*, 558 F. 2d 861 (CA8 1977) (same).

cerning abortion are reinstated, he claims he has been injured by the invalidation of those regulations.[22]

But *Valley Forge Christian College*, 454 U. S., at 472, makes clear that Art. III standing requires an injury with a nexus to the substantive character of the statute or regulation at issue:

> "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 99 (1979), and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision,' *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 38, 41 (1976)."

Any liability for fees is, of course, a consequence of Diamond's decision to intervene, but it cannot fairly be traced to the Illinois Abortion Law. The fee award is wholly unrelated to the subject matter of the litigation, and bears no relation to the statute whose constitutionality is at issue here. It is true that, were the Court to resolve the case on the merits against appellees, appellees would no longer be "prevailing parties" entitled to an award of fees under 42 U. S. C. § 1988. But the mere fact that continued adjudication would provide a remedy for an injury that is only a byproduct of the suit itself does not mean that the injury is cognizable under Art. III.

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[22] While not determinative of the standing claim in this case, Diamond responded to the fee award by filing a motion to dismiss him from the litigation and name Americans United for Life, Inc., as the sole intervenor. See n. 6, *supra*. In the alternative, Diamond asked the District Court to clarify the original intervention order by stating that "AUL is an intervening defendant for all purposes, including the assessment of attorney's fees." The motion further stated that "AUL is the real party in interest." In assessing fees against appellant Diamond, the District Court stated that "the State defendants and intervenors played at least equal roles in defending the abortion statute." *Charles* v. *Daley*, No. 79–C–4541 (Apr. 22, 1985).

VI

The State of Illinois, by failing to appeal, has indicated no direct interest in upholding the four sections of the Abortion Law at issue here. Diamond has stepped in, attempting to maintain the litigation abandoned by the State in which he resides. Because he lacks any judicially cognizable interest in the Abortion Law, his appeal is dismissed for want of jurisdiction.

It is so ordered.

JUSTICE WHITE concurs in the judgment.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, concurring in part and concurring in the judgment.

I join the Court's judgment and Part I of its opinion, and I agree with much of the Court's discussion of why Dr. Diamond's asserted interests in defending the Illinois Abortion Law do not satisfy the Art. III standing requirement. I write separately, however, because I do not agree with the Court's reasons for rejecting Dr. Diamond's contention that Illinois' presence as an appellee ensures that a justiciable controversy is before us. In my view, Dr. Diamond was not a proper intervenor in the Court of Appeals, and therefore Illinois is not before this Court in any capacity, because Diamond was not authorized to bring this appeal under 28 U. S. C. § 1254(2).

The Court assumes that Diamond could properly bring an appeal under § 1254(2) and therefore that Illinois is present in this Court as an appellee under this Court's Rule 10.4. The Court then asserts that Illinois is not "the functional equivalent of an appellant" by virtue of its status as a party under Rule 10.4. *Ante*, at 62–63. On this basis, the Court concludes that Illinois' "failure to invoke our jurisdiction leaves the Court without a 'case' or 'controversy' between appellees and the State of Illinois," *ante*, at 63–64, even if Illinois' interests are actually adverse to appellees' interests. I believe this analysis is needlessly inconsistent with this Court's opinion in *Director, OWCP* v. *Perini North River Associates*, 459 U. S. 297 (1983), which holds that once a case is properly brought here the case-or-controversy requirement can be satisfied even if the parties who are asserting their adverse interests before this Court are not formally aligned as adversaries.

In *Perini*, an employee injured while performing his job filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act. *Id.*, at 300. The employer denied that the employee was covered by the Act, and an Administrative Law Judge found for the employer. At that point, the Director, Office of Workers' Compensation Programs, joined the employee in an appeal to the Benefits Review Board. *Id.*, at 300–301. The Board affirmed the denial of coverage, and the employee sought review of its decision in the Court of Appeals, where the Director participated as a respondent. *Id.*, at 301. The Court of Appeals denied the employee's petition, and the Director—but not the employee—filed a petition for certiorari in this Court. *Id.*, at 301, 303. The employee did, however, file a brief in support of the Director's petition for certiorari and a brief on the merits after certiorari was granted. *Id.*, at 303.

In this Court, the employer challenged the Director's standing to seek review of the Court of Appeals' decision. *Id.*, at 302. Without deciding whether the Director had standing, we held that "the presence of [the employee] as a party respondent arguing for his coverage under the Act assures that an admittedly justiciable controversy is now before the Court." *Id.*, at 305. The basis for our holding was the employer's concession that the Director was a proper party respondent before the Court of Appeals. *Id.*, at 304. As a proper party in the Court of Appeals, the Director had "statutory authority to seek review in this Court" under 28

U. S. C. § 1254(1), which authorizes a grant of certiorari "upon the petition of any party" below. See *id.*, at 304, and n. 13. Therefore, whether or not the Director had standing in this Court, the Director's petition brought the employee before the Court as a party respondent pursuant to this Court's Rule 19.6. *Id.*, at 303–304, and n. 12. Because the employee clearly had standing, and actively asserted his adverse interests in this Court, a live case or controversy was presented. *Id.*, at 305.

In two important respects this case is directly analogous to *Perini.* First, § 1254(2) provides that "a *party* relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution . . . of the United States" may bring an appeal to this Court (emphasis added). Consequently, if Dr. Diamond was a proper party in the Court of Appeals, his statutorily authorized appeal brought this case here, just as the Director's petition for certiorari brought *Perini* to this Court. Second, since Rule 10.4 parallels, as to appeals in this Court, the provisions of Rule 19.6 for cases which come here by way of certiorari, Illinois' presence as an appellee, like the presence of the employee in *Perini* as a respondent, can satisfy the requirements of a live case or controversy even if the party who brought the case here lacks standing. I therefore disagree with the Court's apparent conclusion that the mere fact that Illinois is not an appellant ends the inquiry into whether its presence here assures a live case or controversy.

Perini is fairly distinguishable from this case, however, because in my view Dr. Diamond was not a proper intervenor, at least not in the Court of Appeals, and consequently was not a "party" authorized to bring an appeal here. Appellees contend that "[i]ntervenor claimed no justiciable interest in any of the four provisions before this Court when he sought to intervene below." Brief for Appellees 14. The Courts of Appeals have expressed differing views as to the relationship between the interest required to confer standing and the interest required to intervene under Rule 24 of the Federal Rules of Civil Procedure. See *ante*, at 68, and n. 21. Like the Court, I find it unnecessary to decide that question, because the challenge to Diamond's standing subsumes a challenge to the sufficiency of his interest as an intervenor for purposes of Rule 24. Appellees challenged the propriety of Diamond's intervention in the District Court, and although they did not raise this issue in the Court of Appeals I believe it may properly be considered since, under *Perini*, it bears on whether a justiciable controversy is presented in this Court. If Diamond was not a proper party in the Court of Appeals, his appeal is clearly improper under § 1254(2).

Rule 24(a)(2) provides that a person

> "*shall* be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties" (emphasis added).

Rule 24(b)(2) provides that a person

> "*may* be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties" (emphasis added).

The District Court did not explain whether it granted intervention as of right under Rule 24(a)(2) or permissive intervention under Rule 24(b)(2), and hence it is necessary to consider whether the interests Diamond advanced could have made him a proper intervenor on either theory in the Court of Appeals. This Court's decision in *Donaldson* v. *United*

States, 400 U. S. 517 (1971), establishes that Diamond's asserted interests in the provisions at issue in the Court of Appeals fall well outside the ambit of Rule 24(a)(2), and it is likewise apparent that he was not entitled to permissive intervention under Rule 24(b)(2).

Donaldson held that a taxpayer was not entitled to intervene as of right in a proceeding to enforce an internal revenue summons directed to his former employer, and ordering the employer to produce its records concerning the taxpayer for use in a civil investigation of the taxpayer. The Court recognized that the taxpayer had an interest in the records because they presumably contained details of payments from his employer to him "possessing significance for federal income tax purposes." *Id.*, at 531. Nonetheless, since this interest was "nothing more than a desire" by the taxpayer to overcome his employer's "willingness, under summons, to comply and to produce records," the Court held:

> "This interest cannot be the kind contemplated by Rule 24(a)(2) when it speaks in general terms of 'an interest relating to the property or transaction which is the subject of the action.' What is obviously meant there is a significantly protectable interest." *Ibid.*

Clearly, *Donaldson*'s requirement of a "significantly protectable interest" calls for a direct and concrete interest that is accorded some degree of legal protection. See *Tiffany Fine Arts, Inc.* v. *United States*, 469 U. S. 310, 315 (1985) (noting that *Donaldson* "held that the employee's interest was not legally protectible and affirmed the denial of the employee's motions for intervention"); *New Orleans Public Service, Inc.* v. *United Gas Pipe Line Co.*, 732 F. 2d 452, 464 (CA5 1984) (en banc); *Southern Christian Leadership Conference* v. *Kelley*, 241 U. S. App. D. C. 340, 342, 747 F. 2d 777, 779 (1984) *(per curiam)*. See also Advisory Committee's Notes on Fed. Rule Civ. Proc. 24, 28 U. S. C. App., p. 567. The abstract interests advanced by Diamond are if anything less "significantly protectable" than the interest of the taxpayer in *Donaldson*, who alleged that the summons was unlawful because it was part of an investigation for purposes of criminal prosecution. See 400 U. S., at 521. Diamond's speculative claim that his practice may benefit from the Illinois Abortion Law bespeaks a highly contingent financial interest far less tangible than that of the taxpayer in *Donaldson*, who faced a palpable threat of tax liability; Diamond's "desire that the Illinois Abortion Law as written be obeyed," *ante*, at 66, should fare no better than the taxpayer's desire to prevent his employer from putting him at risk by complying with the summons; and Diamond's asserted interests as a father and a parent are indistinguishable from the interests of any beneficiary of the provisions of a criminal law.

I discern nothing in any of the provisions of the Illinois Abortion Law that were challenged in the Court of Appeals to suggest that Illinois meant to vest physicians, parents, or daughters with "significantly protectable interest[s]." Illinois enacted a criminal law which it would itself enforce, thereby making violators liable to the public as a whole, not to those members of the public who might in some degree benefit from the law's enactment or enforcement. Under these circumstances, it seems clear as a matter of interpreting Rule 24(a)(2) that only the State has a "significantly protectable interest" in undertaking to defend the standards contained in its criminal law, since there is no indication that Illinois intended to confer legally protectible interests on particular beneficiaries of that law.

Diamond's cause is not helped by Rule 24(b)(2), for he fails to satisfy the Rule's requirement, which has remained intact since it was first adopted in 1938, that "an applicant's claim or defense and the main action have a question of law or fact in common." The words "claim or defense" manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit, as is confirmed by Rule 24(c)'s requirement that a person desiring to intervene serve a motion stating "the grounds therefor" and "accompanied by a pleading setting forth the claim or defense for which intervention is sought." Thus, although permissive intervention "plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation," *SEC* v. *United States Realty & Improvement Co.*, 310 U. S. 434, 459 (1940), it plainly *does* require an interest sufficient to support a legal claim or defense which is "founded upon [that] interest" and which satisfies the Rule's commonality requirement. *Id.*, at 460. Dr. Diamond simply has no claim or defense in this sense; he asserts no actual, present interest that would permit him to sue or be sued by appellees, or the State of Illinois, or anyone else, in an action sharing common questions of law or fact with those at issue in this litigation.

This analysis is not affected by any potential liability for attorney's fees to which Diamond may be subject in connection with his intervention in this litigation. I agree with the Court that any such liability is "a byproduct of the suit itself," *ante*, at 70–71, and as such it cannot have served as a basis for intervention in the Court of Appeals. At oral argument the question was raised whether Diamond, if not a proper intervenor, could nonetheless be considered a party against whom attorney's fees may be awarded to "the prevailing party" under 42 U. S. C. § 1988. That issue, however, is not before this Court, since an award of attorney's fees is "uniquely separable from the cause of action" on the merits, *White* v. *New Hampshire Dept. of Employment Security*, 455 U. S. 445, 452 (1982); *FCC* v. *League of Women Voters of California*, 468 U. S. 364, 373–375, n. 10 (1984), and the proceedings in the District Court concerning attorney's fees are neither contained in the record before us nor the subject of the questions presented in Diamond's jurisdictional statement. Accordingly, I express no view as to whether an award of attorney's fees against Dr. Diamond would be proper with respect to any proceedings in which he was not a proper intervenor.

Dr. Diamond, then, was not a proper intervenor in the Court of Appeals, although of course it would have been open to that court to allow him to file a brief as an *amicus curiae*. Accordingly, Dr. Diamond was not authorized to bring an appeal in this Court, and the appeal must be dismissed for want of jurisdiction.

BATSON *v.* KENTUCKY

CERTIORARI TO THE SUPREME COURT OF KENTUCKY

No. 84-6263. Argued December 12, 1985—Decided April 30, 1986

During the criminal trial in a Kentucky state court of petitioner, a black man, the judge conducted *voir dire* examination of the jury venire and excused certain jurors for cause. The prosecutor then used his peremptory challenges to strike all four black persons on the venire, and a jury composed only of white persons was selected. Defense counsel moved to discharge the jury on the ground that the prosecutor's removal of the black veniremen violated petitioner's rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross section of the community, and under the Fourteenth Amendment to equal protection of the laws. Without expressly ruling on petitioner's request for a hearing, the trial judge denied the motion, and the jury ultimately convicted petitioner. Affirming the conviction, the Kentucky Supreme Court observed that recently, in another case, it had relied on *Swain* v. *Alabama*, 380 U. S. 202, and had held that a defendant alleging lack of a fair cross section must demonstrate systematic exclusion of a group of jurors from the venire.

Held:

1. The principle announced in *Strauder* v. *West Virginia*, 100 U. S. 303, that a State denies a black defendant equal protection when it puts him on trial before a jury from which members of his race have been purposefully excluded, is reaffirmed. Pp. 84–89.

(a) A defendant has no right to a petit jury composed in whole or in part of persons of his own race. *Strauder* v. *West Virginia*, 100 U. S. 303, 305. However, the Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors. By denying a person participation in jury service on account of his race, the State also unconstitutionally discriminates against the excluded juror. Moreover, selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. Pp. 85–88.

(b) The same equal protection principles as are applied to determine whether there is discrimination in selecting the venire also govern the State's use of peremptory challenges to strike individual jurors from the petit jury. Although a prosecutor ordinarily is entitled to exercise peremptory challenges for any reason, as long as that reason is related to his view concerning the outcome of the case to be tried, the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant. Pp. 88–89.

2. The portion of *Swain* v. *Alabama*, *supra*, concerning the evidentiary burden placed on a defendant who claims that he has been denied equal protection through the State's discriminatory use of peremptory challenges is rejected. In *Swain*, it was held that a black defendant could make out a prima facie case of purposeful discrimination on proof that the peremptory challenge system as a whole was being perverted. Evidence offered by the defendant in *Swain* did not meet that standard because it did not demonstrate the circumstances under which prosecutors in the jurisdiction were responsible for striking black jurors beyond the facts of the defendant's case. This evidentiary formulation is inconsistent with equal protection standards subsequently developed in decisions relating to selection of the jury venire. A defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection in his case. Pp. 89–96.

3. A defendant may establish a prima facie case of purposeful discrimination solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. The defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. The defendant may also rely on the fact that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate. Finally, the defendant must show that such facts and any other relevant circumstances raise an inference that the prosecutor used peremptory challenges to exclude the veniremen from the petit jury on account of their race. Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. The prosecutor may not rebut a prima facie showing by stating that he challenged the jurors on the assumption that they would be partial to the defendant because of their shared race or by affirming his good faith in individual selections. Pp. 96–98.

4. While the peremptory challenge occupies an important position in trial procedures, the above-stated principles will not undermine the contribution that the challenge generally makes to the administration of justice. Nor will application of such principles create serious administrative difficulties. Pp. 98–99.

5. Because the trial court here flatly rejected petitioner's objection to the prosecutor's removal of all black persons on the venire without requiring the prosecutor to explain his action, the case is remanded for further proceedings. P. 100.

Reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. WHITE, J., *post*, p. 100, and MARSHALL, J., *post*, p. 102, filed concurring opinions. STEVENS, J., filed a concurring opinion, in which BRENNAN, J., joined, *post*, p. 108. O'CONNOR, J., filed a concurring opinion, *post*, p. 111. BURGER, C. J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 112. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 134.

J. David Niehaus argued the cause for petitioner. With him on the briefs were *Frank W. Heft, Jr.*, and *Daniel T. Goyette.*

Rickie L. Pearson, Assistant Attorney General of Kentucky, argued the cause for respondent. With him on the brief were *David L. Armstrong*, Attorney General, and *Carl T. Miller, Jr.*, Assistant Attorney General.

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General Fried, Assistant Attorney General Trott*, and *Sidney M. Glazer.*[*]

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[*] Briefs of *amici curiae* urging reversal were filed for the NAACP Legal Defense and Educational Fund, Inc., by *Julius LeVonne Chambers, Charles Stephen Ralston, Steven L. Winter, Anthony G. Amsterdam*, and *Samuel Rabinove;* for the Lawyers' Committee for Civil Rights Under Law by *Barry Sullivan, Fred N. Fishman, Robert H. Kapp, Norman Redlich, William L. Robinson*, and *Norman J. Chachkin;* and for Michael McCray et al. by *Steven R. Shapiro.*

Robert E. Weiss, Donald A. Kuebler, Robert J. Miller, and *Jack E. Yelverton* filed a brief for the National District Attorneys Association, Inc., as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed for the National Legal Aid and Defender Association by *Patricia Unsinn;* and for Elizabeth Holtzman by *Elizabeth Holtzman, pro se*, and *Barbara D. Underwood.*

JUSTICE POWELL delivered the opinion of the Court.

This case requires us to reexamine that portion of *Swain* v. *Alabama*, 380 U. S. 202 (1965), concerning the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury.[1]

I

Petitioner, a black man, was indicted in Kentucky on charges of second-degree burglary and receipt of stolen goods. On the first day of trial in Jefferson Circuit Court, the judge conducted *voir dire* examination of the venire, excused certain jurors for cause, and permitted the parties to exercise peremptory challenges.[2] The prosecutor used his peremptory challenges to strike all four black persons on the venire, and a jury composed only of white persons was selected. Defense counsel moved to discharge the jury before it was sworn on the ground that the prosecutor's removal of the black veniremen violated petitioner's rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross section of the community, and under the Fourteenth Amendment to equal protection of the laws. Counsel requested a hearing on his motion. Without expressly ruling on the request for a hearing, the trial judge observed that the parties were entitled to use their peremptory challenges to "strike anybody they want to." The judge then denied petitioner's motion, reasoning that the cross-section requirement applies only to selection of the venire and not to selection of the petit jury itself.

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[1] Following the lead of a number of state courts construing their State's Constitution, two Federal Courts of Appeals recently have accepted the view that peremptory challenges used to strike black jurors in a particular case may violate the Sixth Amendment. *Booker* v. *Jabe*, 775 F. 2d 762 (CA6 1985), cert. pending, No. 85–1028; *McCray* v. *Abrams*, 750 F. 2d 1113 (CA2 1984), cert. pending, No. 84–1426. See *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P. 2d 748 (1978); *Riley* v. *State*, 496 A. 2d 997, 1009–1013 (Del. 1985); *State* v. *Neil*, 457 So. 2d 481 (Fla. 1984); *Commonwealth* v. *Soares*, 377 Mass. 461, 387 N. E. 2d 499, cert. denied, 444 U. S. 881 (1979). See also *State* v. *Crespin*, 94 N. M. 486, 612 P. 2d 716 (App. 1980). Other Courts of Appeals have rejected that position, adhering to the requirement that a defendant must prove systematic exclusion of blacks from the petit jury to establish a constitutional violation. *United States* v. *Childress*, 715 F. 2d 1313 (CA8 1983) (en banc), cert. denied, 464 U. S. 1063 (1984); *United States* v. *Whitfield*, 715 F. 2d 145, 147 (CA4 1983). See *Beed* v. *State*, 271 Ark. 526, 530–531, 609 S. W. 2d 898, 903 (1980); *Blackwell* v. *State*, 248 Ga. 138, 281 S. E. 2d 599, 599–600 (1981); *Gilliard* v. *State*, 428 So. 2d 576, 579 (Miss.), cert. denied, 464 U. S. 867 (1983); *People* v. *McCray*, 57 N. Y. 2d 542, 546–549, 443 N. E. 2d 915, 916–919 (1982), cert. denied, 461 U. S. 961 (1983); *State* v. *Lynch*, 300 N. C. 534, 546–547, 268 S. E. 2d 161, 168–169 (1980). Federal Courts of Appeals also have disagreed over the circumstances under which supervisory power may be used to scrutinize the prosecutor's exercise of peremptory challenges to strike blacks from the venire. Compare *United States* v. *Leslie*, 783 F. 2d 541 (CA5 1986) (en banc), with *United States* v. *Jackson*, 696 F. 2d 578, 592–593 (CA8 1982), cert. denied, 460 U. S. 1073 (1983). See also *United States* v. *McDaniels*, 379 F. Supp. 1243 (ED La. 1974).

The jury convicted petitioner on both counts. On appeal to the Supreme Court of Kentucky, petitioner pressed, among other claims, the argument concerning the prosecutor's use of peremptory challenges. Conceding that *Swain* v. *Alabama, supra,* apparently foreclosed an equal protection claim based solely on the prosecutor's conduct in this case, petitioner urged the court to follow decisions of other States, *People* v. *Wheeler,* 22 Cal. 3d 258, 583 P. 2d 748 (1978); *Commonwealth* v. *Soares,* 377 Mass. 461, 387 N. E. 2d 499, cert. denied, 444 U. S. 881 (1979), and to hold that such conduct violated his rights under the Sixth Amendment and § 11 of the Kentucky Constitution to a jury drawn from a cross section of the community. Petitioner also contended that the facts showed that the prosecutor had engaged in a "pattern" of discriminatory challenges in this case and established an equal protection violation under *Swain.*

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[2] The Kentucky Rules of Criminal Procedure authorize the trial court to permit counsel to conduct *voir dire* examination or to conduct the examination itself. Ky. Rule Crim. Proc. 9.38. After jurors have been excused for cause, the parties exercise their peremptory challenges simultaneously by striking names from a list of qualified jurors equal to the number to be seated plus the number of allowable peremptory challenges. Rule 9.36. Since the offense charged in this case was a felony, and an alternate juror was called, the prosecutor was entitled to six peremptory challenges, and defense counsel to nine. Rule 9.40.

The Supreme Court of Kentucky affirmed. In a single paragraph, the court declined petitioner's invitation to adopt the reasoning of *People* v. *Wheeler, supra,* and *Commonwealth* v. *Soares, supra.* The court observed that it recently had reaffirmed its reliance on *Swain,* and had held that a defendant alleging lack of a fair cross section must demonstrate systematic exclusion of a group of jurors from the venire. See *Commonwealth* v. *McFerron,* 680 S. W. 2d 924 (1984). We granted certiorari, 471 U. S. 1052 (1985), and now reverse.

II

In *Swain* v. *Alabama,* this Court recognized that a "State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." 380 U. S., at 203–204. This principle has been "consistently and repeatedly" reaffirmed, *id.,* at 204, in numerous decisions of this Court both preceding and following *Swain.*[3] We reaffirm the principle today.[4]

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[3] See, *e. g., Strauder* v. *West Virginia,* 100 U. S. 303 (1880); *Neal* v. *Delaware,* 103 U. S. 370 (1881); *Norris* v. *Alabama,* 294 U. S. 587 (1935); *Hollins* v. *Oklahoma,* 295 U. S. 394 (1935) *(per curiam); Pierre* v. *Louisiana,* 306 U. S. 354 (1939); *Patton* v. *Mississippi,* 332 U. S. 463 (1947); *Avery* v. *Georgia,* 345 U. S. 559 (1953); *Hernandez* v. *Texas,* 347 U. S. 475 (1954); *Whitus* v. *Georgia,* 385 U. S. 545 (1967); *Jones* v. *Georgia,* 389 U. S. 24 (1967) *(per curiam); Carter* v. *Jury Comm'n of Greene County,* 396 U. S. 320 (1970); *Castaneda* v. *Partida,* 430 U. S. 482 (1977); *Rose* v. *Mitchell,* 443 U. S. 545 (1979); *Vasquez* v. *Hillery,* 474 U. S. 254 (1986).

The basic principles prohibiting exclusion of persons from participation in jury service on account of their race "are essentially the same for grand juries and for petit juries." *Alexander* v. *Louisiana,* 405 U. S. 625, 626, n. 3 (1972); see *Norris* v. *Alabama, supra,* at 589. These principles are reinforced by the criminal laws of the United States. 18 U. S. C. § 243.

[4] In this Court, petitioner has argued that the prosecutor's conduct violated his rights under the Sixth and Fourteenth Amendments to an impartial jury and to a jury drawn from a cross section of the community. Peti-

A

More than a century ago, the Court decided that the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded. *Strauder* v. *West Virginia,* 100 U. S. 303 (1880). That decision laid the foundation for the Court's unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn. In *Strauder,* the Court explained that the central concern of the recently ratified Fourteenth Amendment was to put an end to governmental discrimination on account of race. *Id.,* at 306–307. Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure.

In holding that racial discrimination in jury selection offends the Equal Protection Clause, the Court in *Strauder* recognized, however, that a defendant has no right to a "petit jury composed in whole or in part of persons of his own race." *Id.,* at 305.[5] "The number of our races and nationalities stands in the way of evolution of such a conception" of the demand of equal protection. *Akins* v. *Texas,* 325 U. S. 398, 403 (1945).[6] But the defendant does have the right to be

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tioner has framed his argument in these terms in an apparent effort to avoid inviting the Court directly to reconsider one of its own precedents. On the other hand, the State has insisted that petitioner is claiming a denial of equal protection and that we must reconsider *Swain* to find a constitutional violation on this record. We agree with the State that resolution of petitioner's claim properly turns on application of equal protection principles and express no view on the merits of any of petitioner's Sixth Amendment arguments.

[5] See *Hernandez* v. *Texas, supra,* at 482; *Cassell* v. *Texas,* 339 U. S. 282, 286–287 (1950) (plurality opinion); *Akins* v. *Texas,* 325 U. S. 398, 403 (1945); *Martin* v. *Texas,* 200 U. S. 316, 321 (1906); *Neal* v. *Delaware, supra,* at 394.

[6] Similarly, though the Sixth Amendment guarantees that the petit jury will be selected from a pool of names representing a cross section of the community, *Taylor* v. *Louisiana,* 419 U. S. 522 (1975), we have never held

tried by a jury whose members are selected pursuant to nondiscriminatory criteria. *Martin* v. *Texas*, 200 U. S. 316, 321 (1906); *Ex parte Virginia*, 100 U. S. 339, 345 (1880). The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, *Strauder*, *supra*, at 305,[7] or on the false assumption that members of his race as a group are not qualified to serve as jurors, see *Norris* v. *Alabama*, 294 U. S. 587, 599 (1935); *Neal* v. *Delaware*, 103 U. S. 370, 397 (1881).

Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure. "The very idea of a jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." *Strauder*, *supra*, at 308; see *Carter* v. *Jury Comm'n of Greene County*, 396 U. S. 320, 330 (1970). The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge. *Duncan* v. *Louisiana*, 391 U. S. 145, 156 (1968).[8] Those on the ve-

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that the Sixth Amendment requires that "petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population," *id.*, at 538. Indeed, it would be impossible to apply a concept of proportional representation to the petit jury in view of the heterogeneous nature of our society. Such impossibility is illustrated by the Court's holding that a jury of six persons is not unconstitutional. *Williams* v. *Florida*, 399 U. S. 78, 102–103 (1970).

[7] See *Hernandez* v. *Texas*, *supra*, at 482; *Cassell* v. *Texas*, *supra*, at 287; *Akins* v. *Texas*, *supra*, at 403; *Neal* v. *Delaware*, *supra*, at 394.

[8] See *Taylor* v. *Louisiana*, *supra*, at 530; *Williams* v. *Florida*, *supra*, at 100. See also Powell, Jury Trial of Crimes, 23 Wash. & Lee L. Rev. 1 (1966).

In *Duncan* v. *Louisiana*, decided after *Swain*, the Court concluded that the right to trial by jury in criminal cases was such a fundamental feature of the American system of justice that it was protected against state action nire must be "indifferently chosen,"[9] to secure the defendant's right under the Fourteenth Amendment to "protection of life and liberty against race or color prejudice." *Strauder, supra,* at 309.

Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial. See *Thiel* v. *Southern Pacific Co.,* 328 U. S. 217, 223–224 (1946). A person's race simply "is unrelated to his fitness as a juror." *Id.,* at 227 (Frankfurter, J., dissenting). As long ago as *Strauder,* therefore, the Court recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror. 100 U. S., at 308; see *Carter* v. *Jury Comm'n of Greene County, supra,* at 329–330; *Neal* v. *Delaware, supra,* at 386.

The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. See *Ballard* v. *United States,* 329 U. S. 187, 195 (1946); *McCray* v. *New York,* 461 U. S. 961, 968 (1983) (MARSHALL, J., dissenting from denial of certiorari). Discrimination within the

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by the Due Process Clause of the Fourteenth Amendment. 391 U. S., at 147–158. The Court emphasized that a defendant's right to be tried by a jury of his peers is designed "to prevent oppression by the Government." *Id.,* at 155, 156–157. For a jury to perform its intended function as a check on official power, it must be a body drawn from the community. *Id.,* at 156; *Glasser* v. *United States,* 315 U. S. 60, 86–88 (1942). By compromising the representative quality of the jury, discriminatory selection procedures make "juries ready weapons for officials to oppress those accused individuals who by chance are numbered among unpopular or inarticulate minorities." *Akins* v. *Texas, supra,* at 408 (Murphy, J., dissenting).

[9] 4 W. Blackstone, Commentaries 350 (Cooley ed. 1899) (quoted in *Duncan* v. *Louisiana,* 391 U. S., at 152).

judicial system is most pernicious because it is "a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others." *Strauder*, 100 U. S., at 308.

B

In *Strauder*, the Court invalidated a state statute that provided that only white men could serve as jurors. *Id.*, at 305. We can be confident that no State now has such a law. The Constitution requires, however, that we look beyond the face of the statute defining juror qualifications and also consider challenged selection practices to afford "protection against action of the State through its administrative officers in effecting the prohibited discrimination." *Norris* v. *Alabama, supra*, at 589; see *Hernandez* v. *Texas*, 347 U. S. 475, 478–479 (1954); *Ex parte Virginia, supra*, at 346–347. Thus, the Court has found a denial of equal protection where the procedures implementing a neutral statute operated to exclude persons from the venire on racial grounds,[10] and has made clear that the Constitution prohibits all forms of purposeful racial discrimination in selection of jurors.[11] While decisions of this Court have been concerned largely with discrimination during selection of the venire, the principles announced there also forbid discrimination on account of race in selection of the petit jury. Since the Fourteenth Amendment protects an accused throughout the proceedings bringing him to justice, *Hill* v. *Texas*, 316 U. S. 400, 406 (1942), the State may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at "other stages in the selection process," *Avery* v. *Georgia*, 345 U. S. 559, 562 (1953); see *McCray* v. *New York*, *supra*, at 965, 968

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[10] *E. g., Sims* v. *Georgia*, 389 U. S. 404, 407 (1967) *(per curiam); Whitus* v. *Georgia*, 385 U. S., at 548–549; *Avery* v. *Georgia*, 345 U. S., at 561.

[11] See *Norris* v. *Alabama*, 294 U. S., at 589; *Martin* v. *Texas*, 200 U. S., at 319; *Neal* v. *Delaware*, 103 U. S., at 394, 397.

(MARSHALL, J., dissenting from denial of certiorari); see also *Alexander* v. *Louisiana*, 405 U. S. 625, 632 (1972).

Accordingly, the component of the jury selection process at issue here, the State's privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause.[12] Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges "for any reason at all, as long as that reason is related to his view concerning the outcome" of the case to be tried, *United States* v. *Robinson*, 421 F. Supp. 467, 473 (Conn. 1976), mandamus granted *sub nom. United States* v. *Newman*, 549 F. 2d 240 (CA2 1977), the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.

III

The principles announced in *Strauder* never have been questioned in any subsequent decision of this Court.

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[12] We express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel.

Nor do we express any views on the techniques used by lawyers who seek to obtain information about the community in which a case is to be tried, and about members of the venire from which the jury is likely to be drawn. See generally J. Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to Representative Panels 183–189 (1977). Prior to *voir dire* examination, which serves as the basis for exercise of challenges, lawyers wish to know as much as possible about prospective jurors, including their age, education, employment, and economic status, so that they can ensure selection of jurors who at least have an open mind about the case. In some jurisdictions, where a pool of jurors serves for a substantial period of time, see *id.*, at 116–118, counsel also may seek to learn which members of the pool served on juries in other cases and the outcome of those cases. Counsel even may employ professional investigators to interview persons who have served on a particular petit jury. We have had no occasion to consider particularly this practice. Of course, counsel's effort to obtain possibly relevant information about prospective jurors is to be distinguished from the practice at issue here.

Rather, the Court has been called upon repeatedly to review the application of those principles to particular facts.[13] A recurring question in these cases, as in any case alleging a violation of the Equal Protection Clause, was whether the defendant had met his burden of proving purposeful discrimination on the part of the State. *Whitus* v. *Georgia*, 385 U. S. 545, 550 (1967); *Hernandez* v. *Texas, supra,* at 478–481; *Akins* v. *Texas*, 325 U. S., at 403–404; *Martin* v. *Texas*, 200 U. S. 316 (1906). That question also was at the heart of the portion of *Swain* v. *Alabama* we reexamine today.[14]

A

Swain required the Court to decide, among other issues, whether a black defendant was denied equal protection by the State's exercise of peremptory challenges to exclude members of his race from the petit jury. 380 U. S., at 209–210. The record in *Swain* showed that the prosecutor had used the State's peremptory challenges to strike the six black persons included on the petit jury venire. *Id.*, at 210. While rejecting the defendant's claim for failure to prove purposeful discrimination, the Court nonetheless indicated that the Equal Protection Clause placed some limits on the State's exercise of peremptory challenges. *Id.*, at 222–224.

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[13] See, *e. g., Vasquez* v. *Hillery*, 474 U. S. 254 (1986); *Rose* v. *Mitchell*, 443 U. S. 545 (1979); *Castaneda* v. *Partida*, 430 U. S. 482 (1977); *Alexander* v. *Louisiana*, 405 U. S., at 628–629; *Whitus* v. *Georgia, supra,* at 549–550; *Swain* v. *Alabama*, 380 U. S. 202, 205 (1965); *Coleman* v. *Alabama*, 377 U. S. 129 (1964); *Norris* v. *Alabama, supra,* at 589; *Neal* v. *Delaware, supra,* at 394.

[14] The decision in *Swain* has been the subject of extensive commentary. Some authors have argued that the Court should reconsider the decision. *E. g.,* Van Dyke, *supra,* at 166–167; Imlay, Federal Jury Reformation: Saving a Democratic Institution, 6 Loyola (LA) L. Rev. 247, 268–270 (1973); Kuhn, Jury Discrimination: The Next Phase, 41 S. Cal. L. Rev. 235, 283–303 (1968); Note, Rethinking Limitations on the Peremptory Challenge, 85 Colum. L. Rev. 1357 (1985); Note, Peremptory Challenge—Systematic Exclusion of Prospective Jurors on the Basis of Race, 39 Miss. L. J. 157 (1967); Comment, *Swain v. Alabama:* A Constitutional Blueprint for the Perpetuation of the All-White Jury, 52 Va. L. Rev. 1157 (1966). See also Johnson, Black Innocence and the White Jury, 83 Mich. L. Rev. 1611 (1985).

On the other hand, some commentators have argued that we should adhere to *Swain*. See Saltzburg & Powers, Peremptory Challenges and the Clash Between Impartiality and Group Representation, 41 Md. L. Rev. 337 (1982).

The Court sought to accommodate the prosecutor's historical privilege of peremptory challenge free of judicial control, *id.*, at 214–220, and the constitutional prohibition on exclusion of persons from jury service on account of race, *id.*, at 222–224. While the Constitution does not confer a right to peremptory challenges, *id.*, at 219 (citing *Stilson* v. *United States*, 250 U. S. 583, 586 (1919)), those challenges traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury, 380 U. S., at 219.[15] To preserve the peremptory nature of the prosecutor's challenge, the Court in *Swain* declined to scrutinize his actions in a particular case by relying on a presumption that he properly exercised the State's challenges. *Id.*, at 221–222.

The Court went on to observe, however, that a State may not exercise its challenges in contravention of the Equal Protection Clause. It was impermissible for a prosecutor to use his challenges to exclude blacks from the jury "for reasons wholly unrelated to the outcome of the particular case on trial" or to deny to blacks "the same right and opportunity to participate in the administration of justice enjoyed by the white population." *Id.*, at 224. Accordingly, a black defendant could make out a prima facie case of purposeful discrimination on proof that the peremptory challenge system was "being perverted" in that manner. *Ibid.* For example, an inference of purposeful discrimination would be raised on evidence that a prosecutor, "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries." *Id.*, at 223. Evidence offered by the defendant in *Swain* did not meet that standard. While the defendant showed that prosecutors in the jurisdiction had exercised their strikes to exclude blacks from the jury, he offered no proof of the circumstances under which prosecutors were responsible for striking black jurors beyond the facts of his own case. *Id.*, at 224–228.

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[15] In *Swain*, the Court reviewed the "very old credentials" of the peremptory challenge system and noted the "long and widely held belief that peremptory challenge is a necessary part of trial by jury." 380 U. S., at 219; see *id.*, at 212–219.

A number of lower courts following the teaching of *Swain* reasoned that proof of repeated striking of blacks over a number of cases was necessary to establish a violation of the Equal Protection Clause.[16] Since this interpretation of *Swain* has placed on defendants a crippling burden of proof,[17] prosecutors' peremptory challenges are now largely immune from constitutional scrutiny. For reasons that follow, we reject this evidentiary formulation as inconsistent with standards that have been developed since *Swain* for assessing a prima facie case under the Equal Protection Clause.

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[16] *E. g., United States* v. *Jenkins*, 701 F. 2d 850, 859–860 (CA10 1983); *United States* v. *Boykin*, 679 F. 2d 1240, 1245 (CA8 1982); *United States* v. *Pearson*, 448 F. 2d 1207, 1213–1218 (CA5 1971); *Thigpen* v. *State*, 49 Ala. App. 233, 241, 270 So. 2d 666, 673 (1972); *Jackson* v. *State*, 245 Ark. 331, 336, 432 S. W. 2d 876, 878 (1968); *Johnson* v. *State*, 9 Md. App. 143, 148–150, 262 A. 2d 792, 796–797 (1970); *State* v. *Johnson*, 125 N. J. Super. 438, 311 A. 2d 389 (1973) *(per curiam); State* v. *Shaw*, 284 N. C. 366, 200 S. E. 2d 585 (1973).

[17] See *McCray* v. *Abrams*, 750 F. 2d, at 1120, and n. 2. The lower courts have noted the practical difficulties of proving that the State systematically has exercised peremptory challenges to exclude blacks from the jury on account of race. As the Court of Appeals for the Fifth Circuit observed, the defendant would have to investigate, over a number of cases, the race of persons tried in the particular jurisdiction, the racial composition of the venire and petit jury, and the manner in which both parties exercised their peremptory challenges. *United States* v. *Pearson*, 448 F. 2d 1207, 1217 (1971). The court believed this burden to be "most difficult" to meet. *Ibid.* In jurisdictions where court records do not reflect the jurors' race and where *voir dire* proceedings are not transcribed, the burden would be insurmountable. See *People* v. *Wheeler*, 22 Cal. 3d, at 285–286, 583 P. 2d, at 767–768.

B

Since the decision in *Swain,* we have explained that our cases concerning selection of the venire reflect the general equal protection principle that the "invidious quality" of governmental action claimed to be racially discriminatory "must ultimately be traced to a racially discriminatory purpose." *Washington* v. *Davis,* 426 U. S. 229, 240 (1976). As in any equal protection case, the "burden is, of course," on the defendant who alleges discriminatory selection of the venire "to prove the existence of purposeful discrimination." *Whitus* v. *Georgia,* 385 U. S., at 550 (citing *Tarrance* v. *Florida,* 188 U. S. 519 (1903)). In deciding if the defendant has carried his burden of persuasion, a court must undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U. S. 252, 266 (1977). Circumstantial evidence of invidious intent may include proof of disproportionate impact. *Washington* v. *Davis,* 426 U. S., at 242. We have observed that under some circumstances proof of discriminatory impact "may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds." *Ibid.* For example, "total or seriously disproportionate exclusion of Negroes from jury venires," *ibid.,* "is itself such an 'unequal application of the law . . . as to show intentional discrimination,'" *id.,* at 241 (quoting *Akins* v. *Texas,* 325 U. S., at 404).

Moreover, since *Swain,* we have recognized that a black defendant alleging that members of his race have been impermissibly excluded from the venire may make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. *Washington* v. *Davis*, *supra*, at 239–242. Once the defendant makes the requisite showing, the burden shifts to the State to explain adequately the racial exclusion. *Alexander* v. *Louisiana*, 405 U. S., at 632. The State cannot meet this burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties. See *Alexander* v. *Louisiana*, *supra*, at 632; *Jones* v. *Georgia*, 389 U. S. 24, 25 (1967). Rather, the State must demonstrate that "permissible racially neutral selection criteria and procedures have produced the monochromatic result." *Alexander* v. *Louisiana*, *supra*, at 632; see *Washington* v. *Davis*, *supra*, at 241.[18]

The showing necessary to establish a prima facie case of purposeful discrimination in selection of the venire may be discerned in this Court's decisions. *E. g.*, *Castaneda* v. *Partida*, 430 U. S. 482, 494–495 (1977); *Alexander* v. *Louisiana*, *supra*, at 631–632. The defendant initially must show that he is a member of a racial group capable of being singled out for differential treatment. *Castaneda* v. *Partida*, *supra*, at 494. In combination with that evidence, a defendant may then make a prima facie case by proving that in the particular jurisdiction members of his race have not been summoned for jury service over an extended period of time. *Id.*, at 494. Proof of systematic exclusion from the venire raises an inference of purposeful discrimination because the "result bespeaks discrimination." *Hernandez* v. *Texas*, 347

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[18] Our decisions concerning "disparate treatment" under Title VII of the Civil Rights Act of 1964 have explained the operation of prima facie burden of proof rules. See *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973); *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248 (1981); *United States Postal Service Board of Governors* v. *Aikens*, 460 U. S. 711 (1983). The party alleging that he has been the victim of intentional discrimination carries the ultimate burden of persuasion. *Texas Dept. of Community Affairs* v. *Burdine*, *supra*, at 252–256.

U. S., at 482; see *Arlington Heights* v. *Metropolitan Housing Development Corp., supra,* at 266.

Since the ultimate issue is whether the State has discriminated in selecting the defendant's venire, however, the defendant may establish a prima facie case "in other ways than by evidence of long-continued unexplained absence" of members of his race "from many panels." *Cassell* v. *Texas,* 339 U. S. 282, 290 (1950) (plurality opinion). In cases involving the venire, this Court has found a prima facie case on proof that members of the defendant's race were substantially underrepresented on the venire from which his jury was drawn, and that the venire was selected under a practice providing "the opportunity for discrimination." *Whitus* v. *Georgia, supra,* at 552; see *Castaneda* v. *Partida, supra,* at 494; *Washington* v. *Davis, supra,* at 241; *Alexander* v. *Louisiana, supra,* at 629–631. This combination of factors raises the necessary inference of purposeful discrimination because the Court has declined to attribute to chance the absence of black citizens on a particular jury array where the selection mechanism is subject to abuse. When circumstances suggest the need, the trial court must undertake a "factual inquiry" that "takes into account all possible explanatory factors" in the particular case. *Alexander* v. *Louisiana, supra,* at 630.

Thus, since the decision in *Swain,* this Court has recognized that a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection *in his case.* These decisions are in accordance with the proposition, articulated in *Arlington Heights* v. *Metropolitan Housing Development Corp.,* that "a consistent pattern of official racial discrimination" is not "a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act" is not "immunized by the absence of such discrimination in the making of other comparable decisions." 429 U. S., at 266, n. 14. For evidentiary requirements to dictate that "several must suffer discrimination" before one could object, *McCray* v. *New York*, 461 U. S., at 965 (MARSHALL, J., dissenting from denial of certiorari), would be inconsistent with the promise of equal protection to all.[19]

C

The standards for assessing a prima facie case in the context of discriminatory selection of the venire have been fully articulated since *Swain*. See *Castaneda* v. *Partida*, *supra*, at 494–495; *Washington* v. *Davis*, 426 U. S., at 241–242; *Alexander* v. *Louisiana*, *supra*, at 629–631. These principles support our conclusion that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, *Castaneda* v. *Partida*, *supra*, at 494, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." *Avery* v. *Georgia*, 345 U. S., at 562. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors.

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[19] Decisions under Title VII also recognize that a person claiming that he has been the victim of intentional discrimination may make out a prima facie case by relying solely on the facts concerning the alleged discrimination against him. See cases in n. 18, *supra*.

Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. Though this requirement imposes a limitation in some cases on the full peremptory character of the historic challenge, we emphasize that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause. See *McCray* v. *Abrams*, 750 F. 2d, at 1132; *Booker* v. *Jabe*, 775 F. 2d 762, 773 (CA6 1985), cert. pending, No. 85–1028. But the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race. Cf. *Norris* v. *Alabama*, 294 U. S., at 598–599; see *Thompson* v. *United States*, 469 U. S. 1024, 1026 (1984) (BRENNAN, J., dissenting from denial of certiorari). Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, *supra*, at 86, so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race. Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or "affirm[ing] [his] good faith in making individual selections." *Alexander* v. *Louisiana,* 405 U. S., at 632. If these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause "would be but a vain and illusory requirement." *Norris* v. *Alabama, supra,* at 598. The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried.[20] The trial court then will have the duty to determine if the defendant has established purposeful discrimination.[21]

IV

The State contends that our holding will eviscerate the fair trial values served by the peremptory challenge. Conceding that the Constitution does not guarantee a right to peremptory challenges and that *Swain* did state that their use ultimately is subject to the strictures of equal protection, the State argues that the privilege of unfettered exercise of the challenge is of vital importance to the criminal justice system.

While we recognize, of course, that the peremptory challenge occupies an important position in our trial procedures, we do not agree that our decision today will undermine the contribution the challenge generally makes to the administration of justice. The reality of practice, amply reflected in many state- and federal-court opinions, shows that the challenge may be, and unfortunately at times has been, used to discriminate against black jurors. By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice.[22] In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.

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[20] The Court of Appeals for the Second Circuit observed in *McCray* v. *Abrams,* 750 F. 2d, at 1132, that "[t]here are any number of bases" on which a prosecutor reasonably may believe that it is desirable to strike a juror who is not excusable for cause. As we explained in another context, however, the prosecutor must give a "clear and reasonably specific" explanation of his "legitimate reasons" for exercising the challenges. *Texas Dept. of Community Affairs* v. *Burdine,* 450 U. S., at 258.

[21] In a recent Title VII sex discrimination case, we stated that "a finding of intentional discrimination is a finding of fact" entitled to appropriate deference by a reviewing court. *Anderson* v. *Bessemer City,* 470 U. S. 564, 573 (1985). Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference. *Id.,* at 575–576.

Nor are we persuaded by the State's suggestion that our holding will create serious administrative difficulties. In those States applying a version of the evidentiary standard we recognize today, courts have not experienced serious administrative burdens,[23] and the peremptory challenge system has survived. We decline, however, to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges.[24]

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[22] While we respect the views expressed in JUSTICE MARSHALL's concurring opinion concerning prosecutorial and judicial enforcement of our holding today, we do not share them. The standard we adopt under the Federal Constitution is designed to ensure that a State does not use peremptory challenges to strike any black juror because of his race. We have no reason to believe that prosecutors will not fulfill their duty to exercise their challenges only for legitimate purposes. Certainly, this Court may assume that trial judges, in supervising *voir dire* in light of our decision today, will be alert to identify a prima facie case of purposeful discrimination. Nor do we think that this historic trial practice, which long has served the selection of an impartial jury, should be abolished because of an apprehension that prosecutors and trial judges will not perform conscientiously their respective duties under the Constitution.

[23] For example, in *People* v. *Hall*, 35 Cal. 3d 161, 672 P. 2d 854 (1983), the California Supreme Court found that there was no evidence to show that procedures implementing its version of this standard, imposed five years earlier, were burdensome for trial judges.

[24] In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how

V

In this case, petitioner made a timely objection to the prosecutor's removal of all black persons on the venire. Because the trial court flatly rejected the objection without requiring the prosecutor to give an explanation for his action, we remand this case for further proceedings. If the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed. *E. g.*, *Whitus* v. *Georgia*, 385 U. S., at 549–550; *Hernandez* v. *Texas*, 347 U. S., at 482; *Patton* v. *Mississippi*, 332 U. S., at 469.[25]

It is so ordered.

JUSTICE WHITE, concurring.

The Court overturns the principal holding in *Swain* v. *Alabama*, 380 U. S. 202 (1965), that the Constitution does not require in any given case an inquiry into the prosecutor's reasons for using his peremptory challenges to strike blacks from the petit jury panel in the criminal trial of a black defendant and that in such a case it will be presumed that the prosecutor is acting for legitimate trial-related reasons. The Court now rules that such use of peremptory challenges in a given case may, but does not necessarily, raise an inference, which the prosecutor carries the burden of refuting,

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best to implement our holding today. For the same reason, we express no view on whether it is more appropriate in a particular case, upon a finding of discrimination against black jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case, see *Booker* v. *Jabe*, 775 F. 2d, at 773, or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire, see *United States* v. *Robinson*, 421 F. Supp. 467, 474 (Conn. 1976), mandamus granted *sub nom. United States* v. *Newman*, 549 F. 2d 240 (CA2 1977).

[25] To the extent that anything in *Swain* v. *Alabama*, 380 U. S. 202 (1965), is contrary to the principles we articulate today, that decision is overruled.

that his strikes were based on the belief that no black citizen could be a satisfactory juror or fairly try a black defendant.

I agree that, to this extent, *Swain* should be overruled. I do so because *Swain* itself indicated that the presumption of legitimacy with respect to the striking of black venire persons could be overcome by evidence that over a period of time the prosecution had consistently excluded blacks from petit juries.* This should have warned prosecutors that using peremptories to exclude blacks on the assumption that no black juror could fairly judge a black defendant would violate the Equal Protection Clause.

It appears, however, that the practice of peremptorily eliminating blacks from petit juries in cases with black defendants remains widespread, so much so that I agree that an opportunity to inquire should be afforded when this occurs. If the defendant objects, the judge, in whom the Court puts considerable trust, may determine that the prosecution must respond. If not persuaded otherwise, the judge may conclude that the challenges rest on the belief that blacks could not fairly try a black defendant. This, in effect, attributes to the prosecutor the view that all blacks should be eliminated from the entire venire. Hence, the Court's prior cases dealing with jury venires rather than petit juries are not without relevance in this case.

The Court emphasizes that using peremptory challenges to strike blacks does not end the inquiry; it is not unconstitutional, without more, to strike one or more blacks from the jury. The judge may not require the prosecutor to respond at all. If he does, the prosecutor, who in most cases has had a chance to *voir dire* the prospective jurors, will have an opportunity to give trial-related reasons for his strikes—

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*Nor would it have been inconsistent with *Swain* for the trial judge to invalidate peremptory challenges of blacks if the prosecutor, in response to an objection to his strikes, stated that he struck blacks because he believed they were not qualified to serve as jurors, especially in the trial of a black defendant.

some satisfactory ground other than the belief that black jurors should not be allowed to judge a black defendant.

Much litigation will be required to spell out the contours of the Court's equal protection holding today, and the significant effect it will have on the conduct of criminal trials cannot be gainsaid. But I agree with the Court that the time has come to rule as it has, and I join its opinion and judgment.

I would, however, adhere to the rule announced in *DeStefano* v. *Woods*, 392 U. S. 631 (1968), that *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), which held that the States cannot deny jury trials in serious criminal cases, did not require reversal of a state conviction for failure to grant a jury trial where the trial began prior to the date of the announcement in the *Duncan* decision. The same result was reached in *DeStefano* with respect to the retroactivity of *Bloom* v. *Illinois*, 391 U. S. 194 (1968), as it was in *Daniel* v. *Louisiana*, 420 U. S. 31 (1975) *(per curiam)*, with respect to the decision in *Taylor* v. *Louisiana*, 419 U. S. 522 (1975), holding that the systematic exclusion of women from jury panels violated the Sixth and Fourteenth Amendments.

JUSTICE MARSHALL, concurring.

I join JUSTICE POWELL's eloquent opinion for the Court, which takes a historic step toward eliminating the shameful practice of racial discrimination in the selection of juries. The Court's opinion cogently explains the pernicious nature of the racially discriminatory use of peremptory challenges, and the repugnancy of such discrimination to the Equal Protection Clause. The Court's opinion also ably demonstrates the inadequacy of any burden of proof for racially discriminatory use of peremptories that requires that "justice . . . sit supinely by" and be flouted in case after case before a remedy is available.[1] I nonetheless write separately to express my views. The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.

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[1] *Commonwealth* v. *Martin*, 461 Pa. 289, 299, 336 A. 2d 290, 295 (1975) (Nix, J., dissenting), quoted in *McCray* v. *New York*, 461 U. S. 961, 965, n. 2 (1983) (MARSHALL, J., dissenting from denial of certiorari).

I

A little over a century ago, this Court invalidated a state statute providing that black citizens could not serve as jurors. *Strauder* v. *West Virginia*, 100 U. S. 303 (1880). State officials then turned to somewhat more subtle ways of keeping blacks off jury venires. See *Swain* v. *Alabama*, 380 U. S. 202, 231–238 (1965) (Goldberg, J., dissenting); Kuhn, Jury Discrimination: The Next Phase, 41 S. Cal. L. Rev. 235 (1968); see also J. Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to Representative Panels 155–157 (1977) (hereinafter Van Dyke). Although the means used to exclude blacks have changed, the same pernicious consequence has continued.

Misuse of the peremptory challenge to exclude black jurors has become both common and flagrant. Black defendants rarely have been able to compile statistics showing the extent of that practice, but the few cases setting out such figures are instructive. See *United States* v. *Carter*, 528 F. 2d 844, 848 (CA8 1975) (in 15 criminal cases in 1974 in the Western District of Missouri involving black defendants, prosecutors peremptorily challenged 81% of black jurors), cert. denied, 425 U. S. 961 (1976); *United States* v. *McDaniels*, 379 F. Supp. 1243 (ED La. 1974) (in 53 criminal cases in 1972–1974 in the Eastern District of Louisiana involving black defendants, federal prosecutors used 68.9% of their peremptory challenges against black jurors, who made up less than one-quarter of the venire); *McKinney* v. *Walker*, 394 F. Supp. 1015, 1017–1018 (SC 1974) (in 13 criminal trials in 1970–1971 in Spartansburg County, South Carolina, involving black defendants, prosecutors peremptorily challenged 82% of black jurors), affirmance order, 529 F. 2d 516 (CA4 1975).[2] Prosecutors have explained to courts that they routinely strike black jurors, see *State* v. *Washington*, 375 So. 2d 1162, 1163–1164 (La. 1979). An instruction book used by the prosecutor's office in Dallas County, Texas, explicitly advised prosecutors that they conduct jury selection so as to eliminate "'any member of a minority group.'"[3] In 100 felony trials in Dallas County in 1983–1984, prosecutors peremptorily struck 405 out of 467 eligible black jurors; the chance of a qualified black sitting on a jury was 1 in 10, compared to 1 in 2 for a white.[4]

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[2] See also *Harris* v. *Texas*, 467 U. S. 1261 (1984) (MARSHALL, J., dissenting from denial of certiorari); *Williams* v. *Illinois*, 466 U. S. 981 (1984) (MARSHALL, J., dissenting from denial of certiorari).

The Court's discussion of the utter unconstitutionality of that practice needs no amplification. This Court explained more than a century ago that "'in the selection of jurors to pass upon [a defendant's] life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them, because of their color.'" *Neal* v. *Delaware*, 103 U. S. 370, 394 (1881), quoting *Virginia* v. *Rives*, 100 U. S. 313, 323 (1880). JUSTICE REHNQUIST, dissenting, concedes that exclusion of blacks from a jury, solely because they are black, is at best based upon "crudely stereotypical and . . . in many cases hopelessly mistaken" notions. *Post*, at 138. Yet the Equal Protection Clause prohibits a State from taking any action based on crude, inaccurate racial stereotypes—even an action that does not serve the State's interests. Exclusion of blacks from a jury, solely because of race, can no more be justified by a belief that blacks are less likely than whites to consider fairly or sympathetically the State's case against a black defendant than it can be justified by the notion that blacks lack the "intelligence, experience, or moral integrity," *Neal, supra,* at 397, to be entrusted with that role.

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[3] Van Dyke, at 152, quoting Texas Observer, May 11, 1973, p. 9, col. 2. An earlier jury-selection treatise circulated in the same county instructed prosecutors: "Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated." Quoted in Dallas Morning News, Mar. 9, 1986, p. 29, col. 1.

[4] *Id.*, at 1, col. 1; see also Comment, A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process, 18 St. Louis U. L. J. 662 (1974).

II

I wholeheartedly concur in the Court's conclusion that use of the peremptory challenge to remove blacks from juries, on the basis of their race, violates the Equal Protection Clause. I would go further, however, in fashioning a remedy adequate to eliminate that discrimination. Merely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge.

Evidentiary analysis similar to that set out by the Court, *ante,* at 97–98, has been adopted as a matter of state law in States including Massachusetts and California. Cases from those jurisdictions illustrate the limitations of the approach. First, defendants cannot attack the discriminatory use of peremptory challenges at all unless the challenges are so flagrant as to establish a prima facie case. This means, in those States, that where only one or two black jurors survive the challenges for cause, the prosecutor need have no compunction about striking them from the jury because of their race. See *Commonwealth* v. *Robinson,* 382 Mass. 189, 195, 415 N. E. 2d 805, 809–810 (1981) (no prima facie case of discrimination where defendant is black, prospective jurors include three blacks and one Puerto Rican, and prosecutor excludes one for cause and strikes the remainder peremptorily, producing all-white jury); *People* v. *Rousseau,* 129 Cal. App. 3d 526, 536–537, 179 Cal. Rptr. 892, 897–898 (1982) (no prima facie case where prosecutor peremptorily strikes only two blacks on jury panel). Prosecutors are left free to discriminate against blacks in jury selection provided that they hold that discrimination to an "acceptable" level.

Second, when a defendant can establish a prima facie case, trial courts face the difficult burden of assessing prosecutors' motives. See *King* v. *County of Nassau,* 581 F. Supp. 493, 501–502 (EDNY 1984). Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons. How is the court to treat a prosecutor's statement that he struck a juror because the juror had a son about the same age as defendant, see *People* v. *Hall*, 35 Cal. 3d 161, 672 P. 2d 854 (1983), or seemed "uncommunicative," *King*, *supra*, at 498, or "never cracked a smile" and, therefore "did not possess the sensitivities necessary to realistically look at the issues and decide the facts in this case," *Hall*, *supra*, at 165, 672 P. 2d, at 856? If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory.

Nor is outright prevarication by prosecutors the only danger here. "[I]t is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal." *King*, *supra*, at 502. A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported. As JUSTICE REHNQUIST concedes, prosecutors' peremptories are based on their "seat-of-the-pants instincts" as to how particular jurors will vote. *Post*, at 138; see also THE CHIEF JUSTICE's dissenting opinion, *post*, at 123. Yet "seat-of-the-pants instincts" may often be just another term for racial prejudice. Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels—a challenge I doubt all of them can meet. It is worth remembering that "114 years after the close of the War Between the States and nearly 100 years after *Strauder*, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole." *Rose* v. *Mitchell*, 443 U. S. 545, 558–559 (1979), quoted in *Vasquez* v. *Hillery*, 474 U. S. 254, 264 (1986).

III

The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system. See Van Dyke, at 167–169; Imlay, Federal Jury Reformation: Saving a Democratic Institution, 6 Loyola (LA) L. Rev. 247, 269–270 (1973). Justice Goldberg, dissenting in *Swain*, emphasized that "[w]ere it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former." 380 U. S., at 244. I believe that this case presents just such a choice, and I would resolve that choice by eliminating peremptory challenges entirely in criminal cases.

Some authors have suggested that the courts should ban prosecutors' peremptories entirely, but should zealously guard the defendant's peremptory as "essential to the fairness of trial by jury," *Lewis* v. *United States*, 146 U. S. 370, 376 (1892), and "one of the most important of the rights secured to the accused," *Pointer* v. *United States*, 151 U. S. 396, 408 (1894). See Van Dyke, at 167; Brown, McGuire, & Winters, The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse, 14 New England L. Rev. 192 (1978). I would not find that an acceptable solution. Our criminal justice system "requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held." *Hayes* v. *Missouri*, 120 U. S. 68, 70 (1887). We can maintain that balance, not by permitting both prosecutor and defendant to engage in racial discrimination in jury selection, but by banning the use of peremptory challenges by prosecutors and by allowing the States to eliminate the defendant's peremptories as well.

Much ink has been spilled regarding the historic importance of defendants' peremptory challenges. The approving comments of the *Lewis* and *Pointer* Courts are noted above; the *Swain* Court emphasized the "very old credentials" of the peremptory challenge, 380 U. S., at 212, and cited the "long and widely held belief that peremptory challenge is a necessary part of trial by jury." *Id.*, at 219. But this Court has also repeatedly stated that the right of peremptory challenge is not of constitutional magnitude, and may be withheld altogether without impairing the constitutional guarantee of impartial jury and fair trial. *Frazier* v. *United States*, 335 U. S. 497, 505, n. 11 (1948); *United States* v. *Wood*, 299 U. S. 123, 145 (1936); *Stilson* v. *United States*, 250 U. S. 583, 586 (1919); see also *Swain*, 380 U. S., at 219. The potential for racial prejudice, further, inheres in the defendant's challenge as well. If the prosecutor's peremptory challenge could be eliminated only at the cost of eliminating the defendant's challenge as well, I do not think that would be too great a price to pay.

I applaud the Court's holding that the racially discriminatory use of peremptory challenges violates the Equal Protection Clause, and I join the Court's opinion. However, only by banning peremptories entirely can such discrimination be ended.

JUSTICE STEVENS, with whom JUSTICE BRENNAN joins, concurring.

In his dissenting opinion, THE CHIEF JUSTICE correctly identifies an apparent inconsistency between my criticism of the Court's action in *Colorado* v. *Connelly*, 474 U. S. 1050 (1986) (memorandum of BRENNAN, J., joined by STEVENS, J.), and *New Jersey* v. *T. L. O.*, 468 U. S. 1214 (1984) (STEVENS, J., dissenting)—cases in which the Court directed the State to brief and argue questions not presented in its petition for certiorari—and our action today in finding a violation of the Equal Protection Clause despite the failure of petitioner's counsel to rely on that ground of decision. *Post*, at 115-116, nn. 1 and 2. In this case, however—unlike *Connelly* and *T. L. O.*—the party defending the judgment has explicitly rested on the issue in question as a controlling basis for affirmance. In defending the Kentucky Supreme Court's judgment, Kentucky's Assistant Attorney General emphasized the State's position on the centrality of the equal protection issue:

> ". . . Mr. Chief Justice, and may it please the Court, the issue before this Court today is simply whether Swain versus Alabama should be reaffirmed. . . .
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> . . . . .
>
> ". . . We believe that it is the Fourteenth Amendment that is the item that should be challenged, and presents perhaps an address to the problem. Swain dealt primarily with the use of peremptory challenges to strike individuals who were of a cognizable or identifiable group.
>
> "Petitioners show no case other than the State of California's case dealing with the use of peremptories wherein the Sixth Amendment was cited as authority for resolving the problem. So, we believe that the Fourteenth Amendment is indeed the issue. That was the guts and primarily the basic concern of Swain.
>
> . . . . .
>
> "In closing, we believe that the trial court of Kentucky and the Supreme Court of Kentucky have firmly embraced Swain, and we respectfully request that this Court affirm the opinion of the Kentucky court as well as to reaffirm Swain versus Alabama."[1]

In addition to the party's reliance on the equal protection argument in defense of the judgment, several *amici curiae* also addressed that argument. For instance, the argument in the brief filed by the Solicitor General of the United States begins:

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[1] Tr. of Oral Arg. 27-28, 43.

> "PETITIONER DID NOT ESTABLISH THAT HE WAS DEPRIVED OF A PROPERLY CONSTITUTED PETIT JURY OR DENIED EQUAL PROTECTION OF THE LAWS
>
> "A. Under *Swain* v. *Alabama* A Defendant Cannot Establish An Equal Protection Violation By Showing Only That Black Veniremen Were Subjected To Peremptory Challenge By The Prosecution In His Case"[2]

Several other *amici* similarly emphasized this issue.[3]

In these circumstances, although I suppose it is possible that reargument might enable some of us to have a better informed view of a problem that has been percolating in the courts for several years,[4] I believe the Court acts wisely in

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[2] Brief for United States as *Amicus Curiae* 7.

[3] The argument section of the brief for the National District Attorneys Association, Inc., as *amicus curiae* in support of respondent begins as follows:

"This Court should conclude that the prosecutorial peremptory challenges exercised in this case were proper under the fourteenth amendment equal protection clause and the sixth amendment. This Court should further determine that there is no constitutional need to change or otherwise modify this Court's decision in *Swain* v. *Alabama*." *Id.*, at 5.

Amici supporting petitioner also emphasized the importance of the equal protection issue. See, *e. g.*, Brief for NAACP Legal Defense and Educational Fund, American Jewish Committee, and American Jewish Congress as *Amici Curiae* 24–36; Brief for Lawyers' Committee for Civil Rights Under Law as *Amicus Curiae* 11–17; Brief for Elizabeth Holtzman as *Amicus Curiae* 13.

[4] See *McCray* v. *New York*, 461 U. S. 961 (1983) (opinion of STEVENS, J., respecting denial of certiorari); *id.*, at 963 (MARSHALL, J., dissenting from denial of certiorari).

The eventual federal habeas corpus disposition of *McCray*, of course, proved to be one of the landmark cases that made the issues in this case resolving the issue now on the basis of the arguments that have already been fully presented without any special invitation from this Court.[5]

JUSTICE O'CONNOR, concurring.

I concur in the Court's opinion and judgment, but also agree with the views of THE CHIEF JUSTICE and JUSTICE WHITE that today's decision does not apply retroactively.

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ripe for review. *McCray* v. *Abrams*, 750 F. 2d 1113 (CA2 1984), cert. pending, No. 84–1426. See also Pet. for Cert. 5–7 (relying heavily on *McCray* as a reason for review). In *McCray*, as in almost all opinions that have considered similar challenges, the Court of Appeals for the Second Circuit explicitly addressed the equal protection issue and the viability of *Swain*. 750 F. 2d, at 1118–1124. The pending petition for certiorari in *McCray* similarly raises the equal protection question that has long been central to this issue. Pet. for Cert. in No. 84–1426 (Question 2). Indeed, shortly after agreeing to hear *Batson*, the Court was presented with a motion to consolidate *McCray* and *Batson*, and consider the cases together. Presumably because the Court believed that *Batson* adequately presented the issues with which other courts had consistently grappled in considering this question, the Court denied the motion. See *Abrams* v. *McCray*, 471 U. S. 1097 (1985). Cf. *ibid.* (BRENNAN, MARSHALL, and STEVENS, JJ., dissenting from denial of motion to consolidate).

[5] Although I disagree with his criticism of the Court in this case, I fully subscribe to THE CHIEF JUSTICE's view, expressed today, that the Court should only address issues necessary to the disposition of the case or petition. For contrasting views, see, *e. g.*, *Bender* v. *Williamsport Area School Dist.*, 475 U. S. 534, 551 (1986) (BURGER, C. J., dissenting) (addressing merits even though majority of the Court found a lack of standing); *Colorado* v. *Nunez*, 465 U. S. 324 (1984) (concurring opinion, joined by BURGER, C. J.) (expressing view on merits even though writ was dismissed as improvidently granted because state-court judgment rested on adequate and independent state grounds); *Florida* v. *Casal*, 462 U. S. 637, 639 (1983) (BURGER, C. J., concurring) (agreeing with Court that writ should be dismissed as improvidently granted because judgment rested on adequate and independent state grounds, but noting that "the citizens of the state must be aware that they have the power to amend state law to ensure rational law enforcement"). See also *Colorado* v. *Connelly*, 474 U. S. 1050 (1986) (ordering parties to address issue that neither party raised); *New Jersey* v. *T. L. O.*, 468 U. S. 1214 (1984) (same).

CHIEF JUSTICE BURGER, joined by JUSTICE REHNQUIST, dissenting.

We granted certiorari to decide whether petitioner was tried "in violation of constitutional provisions guaranteeing the defendant an impartial jury and a jury composed of persons representing a fair cross section of the community." Pet. for Cert. i.

I

Today the Court sets aside the peremptory challenge, a procedure which has been part of the common law for many centuries and part of our jury system for nearly 200 years. It does so on the basis of a constitutional argument that was rejected, without a single dissent, in *Swain* v. *Alabama*, 380 U. S. 202 (1965). Reversal of such settled principles would be unusual enough on its own terms, for only three years ago we said that "*stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law." *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 420 (1983). What makes today's holding truly extraordinary is that it is based on a constitutional argument that the petitioner has *expressly* declined to raise, both in this Court and in the Supreme Court of Kentucky.

In the Kentucky Supreme Court, petitioner disclaimed specifically any reliance on the Equal Protection Clause of the Fourteenth Amendment, pressing instead only a claim based on the Sixth Amendment. See Brief for Appellant 14 and Reply Brief for Appellant 1 in No. 84–SC–733–MR (Ky.). As petitioner explained at oral argument here: "We have not made an equal protection claim. . . . We have not made a specific argument in the briefs that have been filed either in the Supreme Court of Kentucky or in this Court saying that we are attacking Swain as such." Tr. of Oral Arg. 6–7. Petitioner has not suggested any barrier prevented raising an equal protection claim in the Kentucky courts. In such circumstances, review of an equal protection argument is improper in this Court: "'The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions . . . .'" *Illinois* v. *Gates*, 459 U. S. 1028, 1029, n. 2 (1982) (STEVENS, J., dissenting) (quoting *Cardinale* v. *Louisiana*, 394 U. S. 437, 438 (1969)). Neither the Court nor JUSTICE STEVENS offers any justification for departing from this time-honored principle, which dates to *Owings* v. *Norwood's Lessee*, 5 Cranch 344 (1809), and *Crowell* v. *Randell*, 10 Pet. 368 (1836).

Even if the equal protection issue had been pressed in the Kentucky Supreme Court, it has surely not been pressed here. This provides an additional and completely separate procedural novelty to today's decision. Petitioner's "question presented" involved only the "constitutional provisions guaranteeing the defendant an impartial jury and a jury composed of persons representing a fair cross section of the community." Pet. for Cert. i. These provisions are found in the Sixth Amendment, not the Equal Protection Clause of the Fourteenth Amendment relied upon by the Court. In his brief on the merits, under a heading distinguishing equal protection cases, petitioner noted "the irrelevance of the *Swain* analysis to the present case," Brief for Petitioner 11; instead petitioner relied solely on Sixth Amendment analysis found in cases such as *Taylor* v. *Louisiana*, 419 U. S. 522 (1975). During oral argument, counsel for petitioner was pointedly asked:

> "QUESTION: Mr. Niehaus, Swain was an equal protection challenge, was it not?
>
> "MR. NIEHAUS: Yes.
>
> "QUESTION: Your claim here is based solely on the Sixth Amendment?
>
> "MR. NIEHAUS: Yes.
>
> "QUESTION: Is that correct?
>
> "MR. NIEHAUS: That is what we are arguing, yes.

> "QUESTION: You are not asking for a reconsideration of Swain, and you are making no equal protection claim here. Is that correct?
>
> "MR. NIEHAUS: We have not made an equal protection claim. I think that Swain will have to be reconsidered to a certain extent if only to consider the arguments that are made on behalf of affirmance by the respondent and the solicitor general.
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> . . . . .
>
> "MR. NIEHAUS: We have not made a specific argument in the briefs that have been filed either in the Supreme Court of Kentucky or in this Court saying that we are attacking Swain as such. . . ." Tr. of Oral Arg. 5–7.

A short time later, after discussing the difficulties attendant with a Sixth Amendment claim, the following colloquy occurred:

> "QUESTION: So I come back again to my question why you didn't attack Swain head on, but I take it if the Court were to overrule Swain, you wouldn't like that result.
>
> "MR. NIEHAUS: Simply overrule Swain without adopting the remedy?
>
> "QUESTION: Yes.
>
> "MR. NIEHAUS: I do not think that would give us much comfort, Your Honor, no.
>
> "QUESTION: That is a concession." *Id.*, at 10.

Later, petitioner's counsel refused to answer the Court's questions concerning the implications of a holding based on equal protection concerns:

> "MR. NIEHAUS: . . . [T]here is no state action involved where the defendant is exercising his peremptory challenge.

> "QUESTION: But there might be under an equal protection challenge if it is the state system that allows that kind of a strike.
>
> "MR. NIEHAUS: I believe that is possible. I am really not prepared to answer that specific question. . . ." *Id.*, at 20.

In reaching the equal protection issue despite petitioner's clear refusal to present it, the Court departs dramatically from its normal procedure without any explanation. When we granted certiorari, we could have—as we sometimes do—directed the parties to brief the equal protection question in addition to the Sixth Amendment question. See, *e. g., Paris Adult Theatre I* v. *Slaton*, 408 U. S. 921 (1972); *Colorado* v. *Connelly*, 474 U. S. 1050 (1986).[1] Even following oral argument, we could have—as we sometimes do—directed reargument on this particular question. See, *e. g., Brown* v. *Board of Education*, 345 U. S. 972 (1953); *Illinois* v. *Gates, supra; New Jersey* v. *T. L. O.*, 468 U. S. 1214 (1984).[2] This step is particularly appropriate where re-

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[1] In *Colorado* v. *Connelly*, JUSTICE BRENNAN, joined by JUSTICE STEVENS, filed a memorandum objecting to this briefing of an additional question, explaining that "it is hardly for this Court to 'second chair' the prosecutor to alter his strategy or guard him from mistakes. Under this Court's Rule 21.1(a), '[o]nly the questions set forth in the petition or fairly included therein will be considered by the Court.' Given petitioner's express disclaimer that [this] issue is presented, that question obviously is not 'fairly included' in the question submitted. The Court's direction that the parties address it anyway makes meaningless in this case the provisions of this Rule and is plainly cause for concern, particularly since it is clear that a similar dispensation would not be granted a criminal defendant, however strong his claim." 474 U. S., at 1052. If the Court's limited step of directing briefing on an additional point at the time certiorari was granted was "cause for concern," I would think *a fortiori* that the far more expansive action the Court takes today would warrant similar concern.

[2] JUSTICE STEVENS, joined by JUSTICE BRENNAN and JUSTICE MARSHALL, dissented from the order directing reargument in *New Jersey* v. *T. L. O.* They explained:

"The single question presented to the Court has now been briefed and argued. Evidently unable or unwilling to decide the question presented examination of a prior decision is under consideration. See, *e. g.*, *Garcia* v. *San Antonio Metropolitan Transit Authority*, 468 U. S. 1213 (1984) (directing reargument and briefing on issue of whether *National League of Cities* v. *Usery*, 426 U. S. 833 (1976), should be reconsidered); *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 422 U. S. 1005 (1975) (directing reargument and briefing on issue of whether the holding in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398 (1964), should be reconsidered). Alternatively, we could have simply dismissed this petition as improvidently granted.

The Court today rejects these accepted courses of action, choosing instead to reverse a 21-year-old unanimous constitutional holding of this Court on the basis of constitutional arguments expressly disclaimed by petitioner. The only explanation for this action is found in JUSTICE STEVENS' concurrence. JUSTICE STEVENS apparently believes that this issue is properly before the Court because "the party defending the judgment has explicitly rested on the issue in question as a controlling basis for affirmance." *Ante*, at 109. Cf. *Illinois* v. *Gates*, 459 U. S., at 1029, n. 1 (STEVENS, J., dissenting) ("[T]here is no impediment to presenting a new argument as an alternative basis for *affirming* the decision below") (emphasis in original). To be sure, respondent and supporting *amici* did cite *Swain* and the Equal Protection Clause. But their arguments were largely limited to ex-

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by the parties, the Court, instead of dismissing the writ of certiorari as improvidently granted, orders reargument directed to the questions that [petitioner] decided not to bring here. . . . Volunteering unwanted advice is rarely a wise course of action.

. . . . .

"I believe that the adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review." 468 U. S., at 1215–1216.

JUSTICE STEVENS' proffered explanation notwithstanding, see *ante*, at 109 (concurring opinion), I am at a loss to discern how one can consistently hold these views and still reach the question the Court reaches today.

plaining that *Swain* placed a negative gloss on the Sixth Amendment claim actually raised by petitioner. In any event, it is a strange jurisprudence that looks to the arguments made by respondent to determine the breadth of the questions presented for our review by petitioner. Of course, such a view is directly at odds with our Rule 21.1(a), which provides that "[o]nly the questions set forth in the petition or fairly included therein will be considered by the Court." JUSTICE STEVENS does not cite, and I am not aware of, *any* case in this Court's nearly 200-year history where the alternative grounds urged by respondent to affirm a judgment were then seized upon to permit petitioner to obtain relief from that very judgment despite petitioner's failure to urge that ground.

JUSTICE STEVENS also observes that several *amici curiae* address the equal protection argument. *Ante*, at 109–110, and n. 3. But I thought it well settled that, even if a "point is made in an *amicus curiae* brief," if the claim "has never been advanced by petitioners . . . we have no reason to pass upon it." *Knetsch* v. *United States*, 364 U. S. 361, 370 (1960).

When objections to peremptory challenges were brought to this Court three years ago, JUSTICE STEVENS agreed with JUSTICE MARSHALL that the challenge involved "a significant and recurring question of constitutional law." *McCray* v. *New York*, 461 U. S. 961, 963 (1983) (MARSHALL, J., dissenting from denial of certiorari), referred to with approval, *id.*, at 961 (opinion of STEVENS, J., respecting denial of certiorari). Nonetheless, JUSTICE STEVENS wrote that the issue could be dealt with "more wisely at a later date." *Id.*, at 962. The same conditions exist here today. JUSTICE STEVENS concedes that reargument of this case "might enable some of us to have a better informed view of a problem that has been percolating in the courts for several years." *Ante*, at 110. Thus, at bottom his position is that we should overrule an extremely important prior constitutional decision of this Court on a claim not advanced here, even though briefing and oral argument on this claim might convince us to do otherwise.[3] I believe that "[d]ecisions made in this manner are unlikely to withstand the test of time." *United States* v. *Leon*, 468 U. S. 897, 962 (1984) (STEVENS, J., dissenting). Before contemplating such a holding, I would at least direct reargument and briefing on the issue of whether the equal protection holding in *Swain* should be reconsidered.

II

Because the Court nonetheless chooses to decide this case on the equal protection grounds not presented, it may be useful to discuss this issue as well. The Court acknowledges, albeit in a footnote, the "'very old credentials'" of the peremptory challenge and the "'widely held belief that peremptory challenge is a necessary part of trial by jury.'" *Ante*, at 91, n. 15 (quoting *Swain*, 380 U. S., at 219). But proper resolution of this case requires more than a nodding reference to the purpose of the challenge. Long ago it was recognized that "[t]he right of challenge is almost essential for the purpose of securing perfect fairness and impartiality in a trial." W. Forsyth, History of Trial by Jury 175 (1852). The peremptory challenge has been in use without scrutiny into its basis for nearly as long as juries have existed. "It was in use amongst the Romans in criminal cases, and the *Lex Servilia* (B.C. 104) enacted that the accuser and the accused should severally propose one hundred *judices*, and that each might reject fifty from the list of the other, so that one hundred would remain to try the alleged crime." *Ibid.;* see also J. Pettingal, An Enquiry into the Use and Practice of Juries Among the Greeks and Romans 115, 135 (1769).

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[3] This fact alone distinguishes the cases cited by JUSTICE STEVENS as support for today's unprecedented action. See *ante*, at 111, n. 5. In *Bender* v. *Williamsport Area School Dist.*, 475 U. S. 534, 551 (1986) (BURGER, C. J., dissenting), *Colorado* v. *Nunez*, 465 U. S. 324 (1984) (WHITE, J., concurring), and *Florida* v. *Casal*, 462 U. S. 637, 639 (1983) (BURGER, C. J., concurring), the issues discussed were all the primary issues advanced, briefed, and argued by the petitioners in this Court or related directly to the Court's basis for deciding the case. To be sure, some of the discussion in these separate statements might be parsimoniously viewed as "[un]necessary to the disposition of the case or petition." *Ante*, at 111, n. 5. But under this approach, many dissenting opinions and dissents from the denial of certiorari would have to be condemned as well. More important, in none of these separate statements was it even suggested that it would be proper to overturn a state-court judgment on issues that had not been briefed and argued by petitioner in this Court, as the Court does today. Finally, in *Colorado* v. *Connelly*, 474 U. S. 1050 (1986), and *New Jersey* v. *T. L. O.*, 468 U. S. 1214 (1984), we directed briefing and argument on particular questions before deciding them. Such a procedure serves the desirable end of ensuring that the issues which the Court wishes to consider will be fully briefed and argued. My suggestion that the Court hear reargument of this case serves the same end.

In *Swain* JUSTICE WHITE traced the development of the peremptory challenge from the early days of the jury trial in England:

> "In all trials for felonies at common law, the defendant was allowed to challenge peremptorily 35 jurors, and the prosecutor originally had a right to challenge any number of jurors without cause, a right which was said to tend to 'infinite delayes and danger.' Coke on Littleton 156 (14th ed. 1791). Thus The Ordinance for Inquests, 33 Edw. 1, Stat. 4 (1305), provided that if 'they that sue for the King will challenge any . . . Jurors, they shall assign . . . a Cause certain.' So persistent was the view that a proper jury trial required peremptories on both sides, however, that the statute was construed to allow the prosecution to direct any juror after examination to 'stand aside' until the entire panel was gone over and the defendant had exercised his challenges; only if there was a deficiency of jurors in the box at that point did the Crown have to show cause in respect to jurors recalled to make up the required number. Peremptories on both sides became the settled law of England, continuing in the above form until after the separation of the Colonies." 380 U. S., at 212–213 (footnotes omitted).

Peremptory challenges have a venerable tradition in this country as well:

> "In the federal system, Congress early took a part of the subject in hand in establishing that the defendant was entitled to 35 peremptories in trials for treason and 20 in trials for other felonies specified in the 1790 Act as punishable by death, 1 Stat. 119 (1790). In regard to trials for other offenses without the 1790 statute, both the defendant and the Government were thought to have a right of peremptory challenge, although the source of this right was not wholly clear. . . .
>
> "The course in the States apparently paralleled that in the federal system. The defendant's right of challenge was early conferred by statute, the number often corresponding to the English practice, the prosecution was thought to have retained the Crown's common-law right to stand aside, and by 1870, most if not all, States had enacted statutes conferring on the prosecution a substantial number of peremptory challenges, the number generally being at least half, but often equal to, the number had by the defendant." *Id.*, at 214–216 (footnotes omitted).

The Court's opinion, in addition to ignoring the teachings of history, also contrasts with *Swain* in its failure to even discuss the rationale of the peremptory challenge. *Swain* observed:

> "The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed for them, and not otherwise. In this way the peremptory satisfies the rule that 'to perform its high function in the best way, "justice must satisfy the appearance of justice."'" *Id.*, at 219 (quoting *In re Murchison*, 349 U. S. 133, 136 (1955)).

Permitting unexplained peremptories has long been regarded as a means to strengthen our jury system in other ways as well. One commentator has recognized:

> "The peremptory, made without giving any reason, avoids trafficking in the core of truth in most common stereotypes. . . . Common human experience, common sense, psychosociological studies, and public opinion polls tell us that it is likely that certain classes of people statistically have predispositions that would make them inappropriate jurors for particular kinds of cases. But to allow this knowledge to be expressed in the evaluative terms necessary for challenges for cause would undercut our desire for a society in which all people are judged as individuals and in which each is held reasonable and open to compromise. . . . [For example,] [a]lthough experience reveals that black males as a class can be biased against young alienated blacks who have not tried to join the middle class, to enunciate this in the concrete expression required of a challenge for cause is societally divisive. Instead we have evolved in the peremptory challenge a system that allows the covert expression of what we dare not say but know is true more often than not." Babcock, Voir Dire: Preserving "Its Wonderful Power," 27 Stan. L. Rev. 545, 553–554 (1975).

For reasons such as these, this Court concluded in *Swain* that "the [peremptory] challenge is 'one of the most important of the rights'" in our justice system. *Swain*, 380 U. S., at 219 (quoting *Pointer* v. *United States*, 151 U. S. 396, 408 (1894)). For close to a century, then, it has been settled that "[t]he denial or impairment of the right is reversible error without a showing of prejudice." *Swain*, *supra*, at 219 (citing *Lewis* v. *United States*, 146 U. S. 370 (1892)).

Instead of even considering the history or function of the peremptory challenge, the bulk of the Court's opinion is spent recounting the well-established principle that intentional exclusion of racial groups from jury venires is a violation of the Equal Protection Clause. I too reaffirm that principle, which has been a part of our constitutional tradition since at least *Strauder* v. *West Virginia*, 100 U. S. 303 (1880). But if today's decision is nothing more than mere "application" of the "principles announced in *Strauder*," as the Court maintains, *ante*, at 89–90, some will consider it curious that the application went unrecognized for over a century. The Court in *Swain* had no difficulty in unanimously concluding that cases such as *Strauder* did not require inquiry into the basis for a peremptory challenge. See *post*, at 135–137 (REHNQUIST, J., dissenting). More recently we held that "[d]efendants are not entitled to a jury of any particular composition . . . ." *Taylor* v. *Louisiana*, 419 U. S., at 538.

A moment's reflection quickly reveals the vast differences between the racial exclusions involved in *Strauder* and the allegations before us today:

> "Exclusion from the venire summons process implies that the government (usually the legislative or judicial branch) . . . has made the general determination that those excluded are unfit to try *any* case. Exercise of the peremptory challenge, by contrast, represents the discrete decision, made by one of two or more opposed *litigants* in the trial phase of our adversary system of justice, that the challenged venireperson will likely be more unfavorable to that litigant in that *particular case* than others on the same venire.
>
> "Thus, excluding a particular cognizable group from all venire pools is stigmatizing and discriminatory in several interrelated ways that the peremptory challenge is not. The former singles out the excluded group, while individuals of all groups are equally subject to peremptory challenge on any basis, including their group affiliation. Further, venire-pool exclusion bespeaks *a priori* across-the-board total unfitness, while peremptory-strike exclusion merely suggests potential partiality in a particular

> isolated case. Exclusion from venires focuses on the inherent attributes of the excluded group and infers its *inferiority*, but the peremptory does not. To suggest that a particular race is unfit to judge in any case necessarily is racially insulting. To suggest that each race may have its own special concerns, or even may tend to favor its own, is not." *United States* v. *Leslie*, 783 F. 2d 541, 554 (CA5 1986) (en banc).

Unwilling to rest solely on jury venire cases such as *Strauder*, the Court also invokes general equal protection principles in support of its holding. But peremptory challenges are often lodged, of necessity, for reasons "normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty." *Swain*, *supra*, at 220. Moreover, in making peremptory challenges, both the prosecutor and defense attorney necessarily act on only limited information or hunch. The process cannot be indicted on the sole basis that such decisions are made on the basis of "assumption" or "intuitive judgment." *Ante*, at 97. As a result, unadulterated equal protection analysis is simply inapplicable to peremptory challenges exercised in any particular case. A clause that requires a minimum "rationality" in government actions has no application to "'an arbitrary and capricious right,'" *Swain*, *supra*, at 219 (quoting *Lewis* v. *United States*, *supra*, at 378); a constitutional principle that may invalidate state action on the basis of "stereotypic notions," *Mississippi University for Women* v. *Hogan*, 458 U. S. 718, 725 (1982), does not explain the breadth of a procedure exercised on the "'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another.'" *Lewis*, *supra*, at 376 (quoting 4 W. Blackstone, Commentaries *353).

That the Court is not applying conventional equal protection analysis is shown by its limitation of its new rule to allegations of impermissible challenge *on the basis of race;* the

Court's opinion clearly contains such a limitation. See *ante*, at 96 (to establish a prima facie case, "the defendant first must show that he is a member of a cognizable *racial group*") (emphasis added); *ibid.* ("[F]inally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury *on account of their race*") (emphasis added). But if conventional equal protection principles apply, then presumably defendants could object to exclusions on the basis of not only race, but also sex, *Craig* v. *Boren*, 429 U. S. 190 (1976); age, *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U. S. 307 (1976); religious or political affiliation, *Karcher* v. *Daggett*, 462 U. S. 725, 748 (1983) (STEVENS, J., concurring); mental capacity, *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432 (1985); number of children, *Dandridge* v. *Williams*, 397 U. S. 471 (1970); living arrangements, *Department of Agriculture* v. *Moreno*, 413 U. S. 528 (1973); and employment in a particular industry, *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456 (1981), or profession, *Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955).[4]

In short, it is quite probable that every peremptory challenge could be objected to on the basis that, because it excluded a venireman who had some characteristic not shared by the remaining members of the venire, it constituted a "classification" subject to equal protection scrutiny. See *McCray* v. *Abrams*, 750 F. 2d 1113, 1139 (CA2 1984) (Meskill, J., dissenting), cert. pending, No. 84–1426. Compounding the difficulties, under conventional equal protection principles some uses of peremptories would be reviewed under "strict scrutiny and . . . sustained only if . . . suitably tailored to serve a compelling state interest," *Cleburne*, 473

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[4] While all these distinctions might support a claim under conventional equal protection principles, a defendant would also have to establish standing to raise them before obtaining any relief. See *Alexander* v. *Louisiana*, 405 U. S. 625, 633 (1972).

U. S., at 440; others would be reviewed to determine if they were "substantially related to a sufficiently important government interest," *id.*, at 441; and still others would be reviewed to determine whether they were "a rational means to serve a legitimate end." *Id.* at 442.

The Court never applies this conventional equal protection framework to the claims at hand, perhaps to avoid acknowledging that the state interest involved here has historically been regarded by this Court as substantial, if not compelling. Peremptory challenges have long been viewed as a means to achieve an impartial jury that will be sympathetic toward neither an accused nor witnesses for the State on the basis of some shared factor of race, religion, occupation, or other characteristic. Nearly a century ago the Court stated that the peremptory challenge is "essential to the fairness of trial by jury." *Lewis* v. *United States*, 146 U. S., at 376. Under conventional equal protection principles, a state interest of this magnitude and ancient lineage might well overcome an equal protection objection to the application of peremptory challenges. However, the Court is silent on the strength of the State's interest, apparently leaving this issue, among many others, to the further "litigation [that] will be required to spell out the contours of the Court's equal protection holding today . . . ." *Ante*, at 102 (WHITE, J., concurring).[5]

The Court also purports to express "no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by *defense* counsel." *Ante*, at 89, n. 12 (emphasis added). But the clear and inescapable import of this novel holding will inevitably be to limit the use of this valuable tool to both prosecutors and defense attorneys alike. Once the Court has held that *prosecutors* are limited in their use of peremptory challenges, could we rationally hold that defendants are not?[6] "Our criminal justice system 'requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.'" *Ante*, at 107 (MARSHALL, J., concurring) (quoting *Hayes* v. *Missouri*, 120 U. S. 68, 70 (1887)).

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[5] The Court is also silent on whether a State may demonstrate that its use of peremptories rests not merely on "assumptions," *ante*, at 97, but on sociological studies or other similar foundations. See Saltzburg & Powers, Peremptory Challenges and the Clash Between Impartiality and Group Representation, 41 Md. L. Rev. 337, 365, and n. 124 (1982). For "[i]f the assessment of a juror's prejudices based on group affiliation is accurate, . . . then counsel has exercised the challenge as it was intended—to remove the most partial jurors." *Id.*, at 365.

Rather than applying straightforward equal protection analysis, the Court substitutes for the holding in *Swain* a curious hybrid. The defendant must first establish a "prima facie case," *ante*, at 93–94, of invidious discrimination, then the "burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Ante*, at 97. The Court explains that "the operation of prima facie burden of proof rules" is established in "[o]ur decisions concerning 'disparate treatment' . . . ." *Ante*, at 94, n. 18. The Court then adds, borrowing again from a Title VII case, that "the prosecutor must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." *Ante*, at 98, n. 20 (quoting *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 258 (1981)).[7]

While undoubtedly these rules are well suited to other contexts, particularly where (as with Title VII) they are required by an Act of Congress,[8] they seem curiously out of place when applied to peremptory challenges in criminal cases. Our system permits two types of challenges: challenges for cause and peremptory challenges. Challenges for cause obviously have to be explained; by definition, peremptory challenges do not. "It is called a peremptory challenge, because the prisoner may challenge peremptorily, on his own dislike, *without showing of any cause.*" H. Joy, On Peremptory Challenge of Jurors 1 (1844) (emphasis added). Analytically, there is no middle ground: A challenge either has to be explained or it does not. It is readily apparent, then, that to permit inquiry into the basis for a peremptory challenge would force "the peremptory challenge [to] collapse into the challenge for cause." *United States* v. *Clark*, 737 F. 2d 679, 682 (CA7 1984). Indeed, the Court recognized without dissent in *Swain* that, if scrutiny were permitted, "[t]he challenge, *pro tanto*, would no longer be peremptory, each and every challenge being open to examination, either at the time of the challenge or at a hearing afterwards." *Swain*, 380 U. S., at 222.

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[6] "[E]very jurisdiction which has spoken to the matter, and prohibited prosecution case-specific peremptory challenges on the basis of cognizable group affiliation, has held that the defense must likewise be so prohibited." *United States* v. *Leslie*, 783 F. 2d 541, 565 (CA5 1986) (en banc).

[7] One court has warned that overturning *Swain* has "[t]he potential for stretching out criminal trials that are already too long, by making the voir dire a Title VII proceeding in miniature." *United States* v. *Clark*, 737 F. 2d 679, 682 (CA7 1984). That "potential" is clearly about to be realized.

[8] It is worth observing that Congress has been unable to locate the constitutional deficiencies in the peremptory challenge system that the Court discerns today. As the Solicitor General explains in urging a re-

Confronted with the dilemma it created, the Court today attempts to decree a middle ground. To rebut a prima facie case, the Court requires a "neutral explanation" for the challenge, but is at pains to "emphasize" that the "explanation need not rise to the level justifying exercise of a challenge for cause." *Ante*, at 97. I am at a loss to discern the governing principles here. A "clear and reasonably specific" explanation of "legitimate reasons" for exercising the challenge will be difficult to distinguish from a challenge for cause. Any-

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jection of the Sixth Amendment issue presented by this petition and an affirmance of the decision below, "[i]n reconciling the traditional peremptory challenge system with the requirements of the Sixth Amendment it is instructive to consider the accommodation made by Congress in the Jury Selection and Service Act of 1968, 28 U. S. C. 1861 *et seq.* . . . [T]he House Report makes clear that . . . 'the bill leaves undisturbed the right of a litigant to exercise his peremptory challenges to eliminate jurors for purely subjective reasons.'" Brief for United States as *Amicus Curiae* 20, n. 11 (quoting H. R. Rep. No. 1076, 90th Cong., 2d Sess., 5–6 (1968)).

thing short of a challenge for cause may well be seen as an "arbitrary and capricious" challenge, to use Blackstone's characterization of the peremptory. See 4 W. Blackstone, Commentaries *353. Apparently the Court envisions permissible challenges short of a challenge for cause that are just a little bit arbitrary—but not too much. While our trial judges are "experienced in supervising *voir dire*," *ante*, at 97, they have no experience in administering rules like this.

An example will quickly demonstrate how today's holding, while purporting to "further the ends of justice," *ante*, at 99, will not have that effect. Assume an Asian defendant, on trial for the capital murder of a white victim, asks prospective jury members, most of whom are white, whether they harbor racial prejudice against Asians. See *Turner* v. *Murray*, *ante*, at 36–37. The basis for such a question is to flush out any "juror who believes that [Asians] are violence-prone or morally inferior . . . ." *Ante*, at 35.[9] Assume further that all white jurors deny harboring racial prejudice but that the defendant, on trial for his life, remains unconvinced by these protestations. Instead, he continues to harbor a hunch, an "assumption," or "intuitive judgment," *ante*, at 97, that these white jurors will be prejudiced against him, presumably based in part on race. The time-honored rule before today was that peremptory challenges could be exercised on such a basis. The Court explained in *Lewis* v. *United States:*

> "[H]ow necessary it is that a prisoner (when put to defend his life) should have good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom

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[9] This question, required by *Turner* in certain capital cases, demonstrates the inapplicability of traditional equal protection analysis to a jury *voir dire* seeking an impartial jury. Surely the question rests on generalized, stereotypic racial notions that would be condemned on equal protection grounds in other contexts.

> he has conceived a prejudice even without being able to assign a reason for such his dislike." 146 U. S., at 376.

The effect of the Court's decision, however, will be to force the defendant to come forward and "articulate a neutral explanation," *ante*, at 98, for his peremptory challenge, a burden he probably cannot meet. This example demonstrates that today's holding will produce juries that the parties do not believe are truly impartial. This will surely do more than "disconcert" litigants; it will diminish confidence in the jury system.

A further painful paradox of the Court's holding is that it is likely to interject racial matters back into the jury selection process, contrary to the general thrust of a long line of Court decisions and the notion of our country as a "melting pot." In *Avery* v. *Georgia*, 345 U. S. 559 (1953), for instance, the Court confronted a situation where the selection of the venire was done through the selection of tickets from a box; the names of whites were printed on tickets of one color and the names of blacks were printed on different color tickets. The Court had no difficulty in striking down such a scheme. Justice Frankfurter observed that "opportunity for working of a discriminatory system exists whenever the mechanism for jury selection *has a component part*, such as the slips here, *that differentiates between white and colored* . . . ." *Id.*, at 564 (concurring) (emphasis added).

Today we mark the return of racial differentiation as the Court accepts a positive evil for a perceived one. Prosecutors and defense attorneys alike will build records in support of their claims that peremptory challenges have been exercised in a racially discriminatory fashion by asking jurors to state their racial background and national origin for the record, despite the fact that "such questions may be offensive to some jurors and thus are not ordinarily asked on voir dire." *People* v. *Motton*, 39 Cal. 3d 596, 604, 704 P. 2d

176, 180, modified, 40 Cal. 3d 4b (1985) (advance sheet).[10] This process is sure to tax even the most capable counsel and judges since determining whether a prima facie case has been established will "require a continued monitoring and recording of the 'group' composition of the panel present and prospective . . . ." *People* v. *Wheeler*, 22 Cal. 3d 258, 294, 583 P. 2d 748, 773 (1978) (Richardson, J., dissenting).

Even after a "record" on this issue has been created, disputes will inevitably arise. In one case, for instance, a conviction was reversed based on the assumption that no blacks were on the jury that convicted a defendant. See *People* v. *Motton, supra.* However, after the court's decision was announced, Carolyn Pritchett, who had served on the jury, called the press to state that the court was in error and that she was black. 71 A. B. A. J. 22 (Nov. 1985). The California court nonetheless denied a rehearing petition.[11]

The Court does not tarry long over any of these difficult, sensitive problems, preferring instead to gloss over them as swiftly as it slides over centuries of history: "[W]e make no attempt to instruct [trial] courts how best to implement our holding today." *Ante,* at 99–100, n. 24. That leaves roughly 7,000 general jurisdiction state trial judges and approximately 500 federal trial judges at large to find their way through the morass the Court creates today. The Court essentially wishes these judges well as they begin the difficult enterprise of sorting out the implications of the Court's newly created "right." I join my colleagues in wishing the Nation's judges well as they struggle to grasp how to implement today's holding. To my mind, however, attention to these "implementation" questions leads quickly to the conclusion that there is no "good" way to implement the holding, let alone a "best" way. As one apparently frustrated judge explained after reviewing a case under a rule like that promulgated by the Court today, judicial inquiry into peremptory challenges

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[10] The California Supreme Court has attempted to finesse this problem by asserting that "discrimination is more often based on appearances than verified racial descent, and a showing that the prosecution was systematically excusing persons who appear to be Black would establish a prima facie case" of racial discrimination. *People* v. *Motton*, 39 Cal. 3d, at 604, 704 P. 2d, at 180. This suggests, however, that proper inquiry here concerns not the actual race of the jurors who are excluded, but rather counsel's subjective impressions as to what race they spring from. It is unclear just how a "record" of such impressions is to be made.

[11] Similar difficulties may lurk in this case on remand. The Court states as fact that "a jury composed only of white persons was selected." *Ante*, at 83. The only basis for the Court's finding is the prosecutor's statement, in response to a question from defense counsel, that "[i]n looking at them, yes; it's an all-white jury." App. 3.

It should also be underscored that the Court today does *not* hold that petitioner has established a "prima facie case" entitling him to any form of relief. *Ante*, at 100.

> "from case to case will take the courts into the quagmire of quotas for groups that are difficult to define and even more difficult to quantify in the courtroom. The pursuit of judicial perfection will require both trial and appellate courts to provide speculative and impractical answers to artificial questions." *Holley* v. *J & S Sweeping Co.*, 143 Cal. App. 3d 588, 595–596, 192 Cal. Rptr. 74, 79 (1983) (Holmdahl, J., concurring) (footnote omitted).

The Court's effort to "furthe[r] the ends of justice," *ante,* at 99, and achieve hoped-for utopian bliss may be admired, but it is far more likely to enlarge the evil "sporting contest" theory of criminal justice roundly condemned by Roscoe Pound almost 80 years ago to the day. See Pound, Causes of Popular Dissatisfaction with the Administration of Justice, August 29, 1906, reprinted in The Pound Conference: Perspectives on Justice in the Future 337 (A. Levin & R. Wheeler eds. 1979). Pound warned then that "too much of the current dissatisfaction has a just origin in our judicial organization and procedure." *Id.*, at 352. I am afraid that today's newly created constitutional right will justly give rise to similar disapproval.

III

I also add my assent to JUSTICE WHITE's conclusion that today's decision does not apply retroactively. *Ante,* at 102 (concurring); see also *ante,* at 111 (O'CONNOR, J., concurring). We held in *Solem* v. *Stumes,* 465 U. S. 638, 643 (1984), that

> "'[t]he criteria guiding resolution of the [retroactivity] question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.' *Stovall* v. *Denno,* 388 U. S. 293, 297 (1967)."

If we are to ignore Justice Harlan's admonition that making constitutional changes prospective only "cuts this Court loose from the force of precedent," *Mackey* v. *United States,* 401 U. S. 667, 680 (1971) (concurring in judgment), then all three of these factors point conclusively to a nonretroactive holding. With respect to the first factor, the new rule the Court announces today is not designed to avert "the clear danger of convicting the innocent." *Tehan* v. *United States ex rel. Shott,* 382 U. S. 406, 416 (1966). Second, it is readily apparent that "law enforcement authorities and state courts have justifiably relied on a prior rule of law . . . ." *Solem,* 465 U. S., at 645–646. Today's holding clearly "overrule[s] [a] prior decision" and drastically "transform[s] standard practice." *Id.,* at 647. This fact alone "virtually compel[s]" the conclusion of nonretroactivity. *United States* v. *Johnson,* 457 U. S. 537, 549–550 (1982). Third, applying today's decision retroactively obviously would lead to a whole host of problems, if not utter chaos. Determining whether a defendant has made a "prima facie showing" of invidious intent, *ante,* at 97, and, if so, whether the state has a sufficient "neutral explanation" for its actions, *ibid.,* essentially requires re-constructing the entire *voir dire,* something that will be extremely difficult even if undertaken soon after the close of the trial.[12] In most cases, therefore, retroactive application of today's decision will be "a virtual impossibility." *State* v. *Neil,* 457 So. 2d 481, 488 (Fla. 1984).

In sum, under our prior holdings it is impossible to construct even a colorable argument for retroactive application. The few States that have adopted judicially created rules similar to that announced by the Court today have all refused full retroactive application. See *People* v. *Wheeler,* 22 Cal. 3d, at 283, n. 31, 583 P. 2d, at 766, n. 31; *State* v. *Neil, supra,* at 488; *Commonwealth* v. *Soares,* 377 Mass. 461, 493, n. 38, 387 N. E. 2d 499, 518, n. 38, cert. denied, 444 U. S. 881 (1979).[13] I therefore am persuaded by JUSTICE WHITE's position, *ante,* at 102 (concurring), that today's novel decision is not to be given retroactive effect.

IV

An institution like the peremptory challenge that is part of the fabric of our jury system should not be casually cast aside, especially on a basis not raised or argued by the petitioner. As one commentator aptly observed:

> "The real question is whether to tinker with a system, be it of jury selection or anything else, that has done the job for centuries. We stand on the shoulders of our ancestors, as Burke said. It is not so much that the past is always worth preserving, he argued, but rather that 'it is with infinite caution that any man ought to venture upon pulling down an edifice, which has answered in any tolerable degree for ages the common purposes

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[12] Petitioner concedes that it would be virtually impossible for the prosecutor in this case to recall why he used his peremptory challenges in the fashion he did. Brief for Petitioner 35.

[13] Although Delaware has suggested that it might follow a rule like that adopted by the Court today, see *Riley* v. *State,* 496 A. 2d 997 (1985), the issue of retroactive application of the rule does not appear to have been litigated in a published decision.

> of society. . . .'" Younger, Unlawful Peremptory Challenges, 7 Litigation 23, 56 (Fall 1980).

At the very least, this important case reversing centuries of history and experience ought to be set for reargument next Term.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

The Court states, in the opening line of its opinion, that this case involves only a reexamination of that portion of *Swain* v. *Alabama*, 380 U. S. 202 (1965), concerning "the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury." *Ante*, at 82 (footnote omitted). But in reality the majority opinion deals with much more than "evidentiary burden[s]." With little discussion and less analysis, the Court also overrules one of the fundamental substantive holdings of *Swain*, namely, that the State may use its peremptory challenges to remove from the jury, on a case-specific basis, prospective jurors of the same race as the defendant. Because I find the Court's rejection of this holding both ill considered and unjustifiable under established principles of equal protection, I dissent.

In *Swain*, this Court carefully distinguished two possible scenarios involving the State's use of its peremptory challenges to exclude blacks from juries in criminal cases. In Part III of the majority opinion, the *Swain* Court concluded that the first of these scenarios, namely, the exclusion of blacks "for reasons wholly unrelated to the outcome of the particular case on trial . . . to deny the Negro the same right and opportunity to participate in the adminstration of justice enjoyed by the white population," 380 U. S., at 224, might violate the guarantees of equal protection. See *id.*, at 222–228. The Court felt that the important and historic purposes of the peremptory challenge were not furthered by the exclusion of blacks "in case after case, whatever the circumstances, whatever the crime *and whoever the defendant or the victim may be.*" *Id.*, at 223 (emphasis added). Nevertheless, the Court ultimately held that "the record in this case is not sufficient to demonstrate that th[is] rule has been violated . . . . Petitioner has the burden of proof and he has failed to carry it." *Id.*, at 224, 226. Three Justices dissented, arguing that the petitioner's evidentiary burden was satisfied by testimony that no black had ever served on a petit jury in the relevant county. See *id.*, at 228–247 (Goldberg, J., joined by Warren, C. J., and Douglas, J., dissenting).

Significantly, the *Swain* Court reached a very different conclusion with respect to the second kind of peremptory-challenge scenario. In Part II of its opinion, the Court held that the State's use of peremptory challenges to exclude blacks from a particular jury based on the assumption or belief that they would be more likely to favor a black defendant does not violate equal protection. *Id.*, at 209–222. JUSTICE WHITE, writing for the Court, explained:

> "While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a *real or imagined* partiality that is less easily designated or demonstrable. *Hayes* v. *Missouri*, 120 U. S. 68, 70 [1887]. It is often exercised upon the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another,' *Lewis* [v. *United States*, 146 U. S. 370,] 376 [1892], upon a juror's 'habits and associations,' *Hayes* v. *Missouri*, *supra*, at 70, or upon the feeling that 'the bare questioning [a juror's] indifference may sometimes provoke a resentment,' *Lewis*, *supra*, at 376. It is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people

> summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be. . . . Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, *which may include their group affiliations*, in the context of the case to be tried.
>
> With these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause. To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge. The challenge, *pro tanto*, would no longer be peremptory . . . ." *Id.*, at 220–222 (emphasis added; footnotes omitted).

At the beginning of Part III of the opinion, the *Swain* Court reiterated: "We have decided that it is permissible to insulate from inquiry the removal of Negroes from a particular jury on the assumption that the prosecutor is acting on acceptable considerations related to the case he is trying, *the particular defendant involved* and the particular crime charged." *Id.*, at 223 (emphasis added).

Even the *Swain* dissenters did not take issue with the majority's position that the Equal Protection Clause does not prohibit the State from using its peremptory challenges to exclude blacks based on the assumption or belief that they would be partial to a black defendant. The dissenters emphasized that their view concerning the evidentiary burden facing a defendant who alleges an equal protection claim based on the State's use of peremptory challenges "would

[not] mean that where systematic exclusion of Negroes from jury service has not been shown, a prosecutor's motives are subject to question or judicial inquiry when he excludes Negroes or any other group from sitting on a jury *in a particular case.*" *Id.*, at 245 (Goldberg, J., dissenting) (emphasis added).

The Court today asserts, however, that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely . . . on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Ante*, at 89. Later, in discussing the State's need to establish a nondiscriminatory basis for striking blacks from the jury, the Court states that "the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race." *Ante*, at 97. Neither of these statements has anything to do with the "evidentiary burden" necessary to establish an equal protection claim in this context, and both statements are directly contrary to the view of the Equal Protection Clause shared by the majority and the dissenters in *Swain*. Yet the Court in the instant case offers absolutely no analysis in support of its decision to overrule *Swain* in this regard, and in fact does not discuss Part II of the *Swain* opinion at all.

I cannot subscribe to the Court's unprecedented use of the Equal Protection Clause to restrict the historic scope of the peremptory challenge, which has been described as "a necessary part of trial by jury." *Swain*, 380 U. S., at 219. In my view, there is simply nothing "unequal" about the State's using its peremptory challenges to strike blacks from the jury in cases involving black defendants, so long as such challenges are also used to exclude whites in cases involving white defendants, Hispanics in cases involving Hispanic defendants, Asians in cases involving Asian defendants, and so on. This case-specific use of peremptory challenges by the State does not single out blacks, or members of any other race for that matter, for discriminatory treatment.[1] Such use of peremptories is at best based upon seat-of-the-pants instincts, which are undoubtedly crudely stereotypical and may in many cases be hopelessly mistaken. But as long as they are applied across-the-board to jurors of all races and nationalities, I do not see—and the Court most certainly has not explained—how their use violates the Equal Protection Clause.

Nor does such use of peremptory challenges by the State infringe upon any other constitutional interests. The Court does not suggest that exclusion of blacks from the jury through the State's use of peremptory challenges results in a violation of either the fair-cross-section or impartiality component of the Sixth Amendment. See *ante*, at 84–85, n. 4. And because the case-specific use of peremptory challenges by the State does not deny blacks the right to serve as jurors in cases involving nonblack defendants, it harms neither the excluded jurors nor the remainder of the community. See *ante*, at 87–88.

The use of group affiliations, such as age, race, or occupation, as a "proxy" for potential juror partiality, based on the assumption or belief that members of one group are more likely to favor defendants who belong to the same group, has long been accepted as a legitimate basis for the State's exercise of peremptory challenges. See *Swain*, *supra; United States* v. *Leslie*, 783 F. 2d 541 (CA5 1986) (en banc); *United States* v. *Carter*, 528 F. 2d 844 (CA8 1975), cert. denied, 425 U. S. 961 (1976). Indeed, given the need for reasonable limitations on the time devoted to *voir dire*, the use of such "proxies" by both the State and the defendant[2] may be extremely useful in eliminating from the jury persons who might be biased in one way or another. The Court today holds that the State may not use its peremptory challenges to strike black prospective jurors on this basis without violating the Constitution. But I do not believe there is anything in the Equal Protection Clause, or any other constitutional provision, that justifies such a departure from the substantive holding contained in Part II of *Swain*. Petitioner in the instant case failed to make a sufficient showing to overcome the presumption announced in *Swain* that the State's use of peremptory challenges was related to the context of the case. I would therefore affirm the judgment of the court below.

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[1] I note that the Court does not rely on the argument that, because there are fewer "minorities" in a given population than there are "majorities," the equal use of peremptory challenges against members of "majority" and "minority" racial groups has an unequal impact. The flaws in this argument are demonstrated in Judge Garwood's thoughtful opinion for the en banc Fifth Circuit in *United States* v. *Leslie*, 783 F. 2d 541, 558–561 (1986).

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[2] See, *e. g.*, *Commonwealth* v. *DiMatteo*, 12 Mass. App. 547, 427 N. E. 2d 754 (1981) (under State Constitution, trial judge properly rejected white defendant's attempted peremptory challenge of black prospective juror).

SMALIS ET AL. *v.* PENNSYLVANIA

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

No. 85–227. Argued April 2, 1986—Decided May 5, 1986

Petitioners, husband and wife, who owned a building housing a restaurant and apartments, were charged with various crimes in connection with a fire in the building that resulted in the killing of two tenants. At the close of the prosecution's case in chief at their bench trial in a Pennsylvania state court, petitioners challenged the sufficiency of the evidence by filing a demurrer pursuant to a Pennsylvania Rule of Criminal Procedure. The trial court sustained the demurrer, and the Pennsylvania Superior Court quashed the Commonwealth's appeal on the ground that it was barred by the Double Jeopardy Clause. The Pennsylvania Supreme Court reversed, holding that the granting of a demurrer is not the functional equivalent of an acquittal and that, for purposes of considering a plea of double jeopardy, a defendant who demurs at the close of the prosecution's case in chief "elects to seek dismissal on grounds unrelated to his factual guilt or innocence."

Held: The trial judge's granting of petitioners' demurrer was an acquittal under the Double Jeopardy Clause, and the Commonwealth's appeal was barred because reversal would have led to further trial proceedings. Whether the trial is to a jury or, as here, to the bench, subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause. Pp. 144–146.

507 Pa. 344, 490 A. 2d 394, reversed.

WHITE, J., delivered the opinion for a unanimous Court.

Norma Chase argued the cause for petitioners. With her on the briefs was *Thomas A. Livingston.*

Robert L. Eberhardt argued the cause and filed a brief for respondent.

Deputy Solicitor General Frey argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief was *Solicitor General Fried, Assistant Attorney General Trott,* and *Alan I. Horowitz.**

**Charles S. Sims* filed a brief for the American Civil Liberties Union et al as *amici curiae* urging reversal.

JUSTICE WHITE delivered the opinion of the Court.

At the close of the prosecution's case in chief, the trial court dismissed certain charges against petitioners on the ground that the evidence presented was legally insufficient to support a conviction. The question presented is whether the Double Jeopardy Clause bars the prosecution from appealing this ruling.

I

Petitioners, husband and wife, owned a building housing a restaurant and some apartments that burned under suspicious circumstances, killing two of the tenants. Petitioners were charged with various crimes in connection with this fire, including criminal homicide, reckless endangerment, and causing a catastrophe.[1] They opted for a bench trial, and at the close of the prosecution's case in chief challenged the sufficiency of the evidence by filing a demurrer pursuant to Pennsylvania Rule of Criminal Procedure 1124(a)(1).[2] The trial court sustained petitioners' demurrer to charges of murder, voluntary manslaughter, and causing a catastrophe, stating:

> "As the trier of fact and law, the court was not satisfied, after considering all of the facts together with all reason-

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[1] Various misdemeanor charges were also filed against petitioners, as well as charges relating to a previous fire in another building that they owned. These other charges are not relevant to this petition.

[2] Pennsylvania Rule of Criminal Procedure 1124, 42 Pa. Cons. Stat. (1985 Pamphlet), provides in relevant part:

"Challenges to Sufficiency of Evidence

"(a) A defendant may challenge the sufficiency of the evidence to sustain a conviction of one or more of the offenses charged by a:

"(1) demurrer to the evidence presented by the Commonwealth at the close of the Commonwealth's case-in-chief;

. . . . .

"(b) A demurrer to the evidence shall not constitute an admission of any facts or inferences except for the purpose of deciding the demurrer. If the demurrer is not sustained, the defendant may present evidence and the case shall proceed."

> able inferences which the Commonwealth's evidence tended to prove, that there was sufficient evidence from which it could be concluded that either of the defendants was guilty beyond a reasonable doubt of setting or causing to be set the fire in question." App. to Pet. for Cert. 101a–102a.

The Commonwealth sought review of this ruling in the Superior Court of Pennsylvania, but a panel of that court quashed the appeal, holding it barred by the Double Jeopardy Clause. The Superior Court granted review en banc and affirmed. 331 Pa. Super. 307, 480 A. 2d 1046 (1984). Citing a number of our decisions as controlling authority, the court set out two relevant principles of law. First, a judgment that the evidence is legally insufficient to sustain a guilty verdict constitutes an acquittal for purposes of the Double Jeopardy Clause. See, *e. g., United States* v. *Martin Linen Supply Co.*, 430 U. S. 564 (1977); *Burks* v. *United States*, 437 U. S. 1 (1978); *Sanabria* v. *United States*, 437 U. S. 54 (1978); *United States* v. *Scott*, 437 U. S. 82, 91 (1978) (dicta); *Hudson* v. *Louisiana*, 450 U. S. 40 (1981). Second, when a trial court enters such a judgment, the Double Jeopardy Clause bars an appeal by the prosecution not only when it might result in a second trial, but also if reversal would translate into further proceedings devoted to the resolution of factual issues going to the elements of the offense charged. The Superior Court concluded that because reversal of the trial court's granting of petitioners' demurrer would necessitate further trial proceedings, the Commonwealth's appeal was improper under *Martin Linen*.

The Commonwealth appealed to the Supreme Court of Pennsylvania, which reversed. *Commonwealth* v. *Zoller*, 507 Pa. 344, 490 A. 2d 394 (1985).[3] The court relied heavily on the statement in *United States* v. *Scott*, *supra*, that a trial judge's ruling in a defendant's favor constitutes an acquittal "only when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.'" *Id.*, at 97 (quoting *Martin Linen, supra,* at 571). The court gave the following explanation of why the trial court's ruling on petitioners' demurrer is not within this definition of an acquittal:

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[3] Before the Pennsylvania Supreme Court, petitioners' case was consolidated with another case presenting the same double jeopardy issue, *Commonwealth* v. *Zoller*, 318 Pa. Super. 402, 465 A. 2d 16 (1983).

> "In deciding whether to grant a demurrer, the court does not determine whether or not the defendant is guilty on such evidence, but determines whether the evidence, if credited by the jury, is legally sufficient to warrant the conclusion that the defendant is guilty beyond a reasonable doubt. . . .
>
> "Hence, by definition, a demurrer is not a factual determination. . . . [T]he question before the trial judge in ruling on a demurrer remains purely one of law.
>
> "We conclude, therefore, that a demurrer is not the functional equivalent of an acquittal, and that the Commonwealth has the right to appeal from an order sustaining defendant's demurrer to its case-in-chief. In such a situation, the defendant himself elects to seek dismissal on grounds unrelated to his factual guilt or innocence." *Commonwealth* v. *Zoller, supra,* at 357–358, 490 A. 2d, at 401.

Accordingly, the Pennsylvania Supreme Court remanded the case to the Superior Court for a determination on the merits of the appeal. We granted certiorari, 474 U. S. 944 (1985), and now reverse.[4]

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[4] For purposes of our jurisdiction, the judgment of the Pennsylvania Supreme Court was final and subject to review at this time under 28 U. S. C. § 1257(3). *Harris* v. *Washington,* 404 U. S. 55 (1971). As explained in *Abney* v. *United States,* 431 U. S. 651 (1977):

"[T]he guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal

II

The Pennsylvania Supreme Court erred in holding that, for purposes of considering a plea of double jeopardy, a defendant who demurs at the close of the prosecution's case in chief "elects to seek dismissal on grounds unrelated to his factual guilt or innocence." *Commonwealth* v. *Zoller, supra,* at 358, 490 A. 2d, at 401. What the demurring defendant seeks is a ruling that as a matter of law the State's evidence is insufficient to establish his factual guilt.[5] Our past decisions, which we are not inclined to reconsider at this time, hold that such a ruling is an acquittal under the Double Jeopardy Clause. See, *e. g., United States* v. *Martin Linen Supply Co., supra; Sanabria* v. *United States, supra.*[6] *United States* v. *Scott* does not overturn these precedents; indeed, it plainly indicates that the category of acquittals includes "judgment[s] . . . by the court that the evidence is insufficient to convict." 437 U.S., at 91.[7]

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trial more than once for the same offense. . . . Obviously, these aspects of the guarantee's protections would be lost if the accused were forced to 'run the gauntlet' a second time before an appeal could be taken; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit." *Id.*, at 661–662 (footnote omitted).

[5] We of course accept the Pennsylvania Supreme Court's definition of what the trial judge must consider in ruling on a defendant's demurrer. But just as "the trial judge's characterization of his own action cannot control the classification of the action [under the Double Jeopardy Clause]," *United States* v. *Scott,* 437 U. S. 82, 96 (1978) (citation omitted), so too the Pennsylvania Supreme Court's characterization, as a matter of double jeopardy law, of an order granting a demurrer is not binding on us.

[6] See also *Burks* v. *United States,* 437 U. S. 1 (1978), where a Court of Appeals' reversal of the defendant's conviction on the ground that the evidence was insufficient to sustain the jury verdict "unquestionably . . . 'represente[d] a resolution, correct or not, of some or all of the factual elements of the offense charged.'" *Id.* at 10 (quoting *Martin Linen,* 430 U. S., at 571).

[7] The status of the trial court's judgment as an acquittal is not affected by the Commonwealth's allegation that the court "erred in deciding what

The Commonwealth argues that its appeal is nonetheless permissible under *Justices of Boston Municipal Court* v. *Lydon*, 466 U. S. 294 (1984), because resumption of petitioners' bench trial following a reversal on appeal would simply constitute "continuing jeopardy." Brief for Respondent 87–88. But *Lydon* teaches that "[a]cquittals, unlike convictions, terminate the initial jeopardy." 466 U. S., at 308. Thus, whether the trial is to a jury or to the bench, subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause. *Arizona* v. *Rumsey*, 467 U. S. 203, 211–212 (1984).[8]

When a successful postacquittal appeal by the prosecution would lead to proceedings that violate the Double Jeopardy Clause, the appeal itself has no proper purpose. Allowing such an appeal would frustrate the interest of the accused in having an end to the proceedings against him. The Superior Court was correct, therefore, in holding that the Double Jeopardy Clause bars a postacquittal appeal by the prosecu-

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degree of recklessness was . . . required to be shown under Pennsylvania's definition of [third-degree] murder." Tr. of Oral Arg. 24. "[T]he fact that 'the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles' . . . affects the accuracy of that determination but it does not alter its essential character." *United States* v. *Scott*, 437 U. S., at 98 (quoting *id.*, at 106 (BRENNAN, J., dissenting)). Accord, *Sanabria* v. *United States*, 437 U. S. 54 (1978); *Arizona* v. *Rumsey*, 467 U. S. 203 (1984).

[8] In *Rumsey*, a trial judge sitting as a sentencer in a death-penalty proceeding entered an "acquittal," *i. e.*, a life sentence, based on an erroneous construction of the law governing a particular aggravating circumstance. The Court held that the Double Jeopardy Clause barred a second sentencing hearing. It distinguished *United States* v. *Wilson*, 420 U. S. 332 (1975), which holds that the prosecution may appeal when the trial court enters judgment n.o.v. following a jury verdict of guilty. *Rumsey* explains that "[n]o double jeopardy problem was presented in *Wilson* because the appellate court, upon reviewing asserted legal errors of the trial judge, could simply order the jury's guilty verdict reinstated; no new factfinding would be necessary, and the defendant therefore would not be twice placed in jeopardy." 467 U. S., at 211–212.

tion not only when it might result in a second trial, but also if reversal would translate into "'further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged.'" *Martin Linen*, 430 U. S., at 570.[9]

We hold, therefore, that the trial judge's granting of petitioners' demurrer was an acquittal under the Double Jeopardy Clause, and that the Commonwealth's appeal was barred because reversal would have led to further trial proceedings.

The judgment of the Pennsylvania Supreme Court is

Reversed.

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[9] The fact that the "further proceedings" standard which the Superior Court quoted from *Martin Linen* was first articulated in *United States* v. *Jenkins*, 420 U. S. 358, 370 (1975), does not detract from its authority. *United States* v. *Scott, supra*, overrules *Jenkins* only insofar as *Jenkins* bars an appeal by the government when a defendant successfully moves for dismissal on a ground "unrelated to factual guilt or innocence. . . ." *Scott, supra*, at 99. The issue before us in *Scott* was what constitutes an acquittal under the Double Jeopardy Clause; the question of the circumstances under which an acquittal is appealable was not presented.

POLAND *v.* ARIZONA

CERTIORARI TO THE SUPREME COURT OF ARIZONA

No. 85–5023. Argued February 24, 1986—Decided May 5, 1986*

Petitioners robbed a bank van of $281,000 in cash and killed the guards by dumping them into a lake in sacks weighted with rocks. Petitioners were convicted of first-degree murder in an Arizona state court. At a separate hearing, while finding that the statutory aggravating circumstance that the offense was committed for "pecuniary gain" was not present because it applied only to contract killings, the trial judge sentenced petitioners to death upon finding that the statutory aggravating circumstance that the offense was committed in "an especially heinous, cruel, or depraved manner" was present. The Arizona Supreme Court, while reversing and remanding for a retrial on other grounds, held that the evidence was insufficient to support a finding of the "especially heinous" circumstance, but that the trial judge erred in finding the "pecuniary gain" circumstance limited to contract killings, and that if petitioners were again convicted the judge might find this circumstance present. On remand, petitioners were again convicted of first-degree murder and the trial judge again sentenced them to death, finding that both the "pecuniary gain" and "especially heinous" circumstances were present. The Arizona Supreme Court affirmed, rejecting petitioners' argument that the Double Jeopardy Clause barred reimposition of the death penalty. The court found the evidence still insufficient to support the "especially heinous" circumstance but sufficient to support the "pecuniary gain" circumstance.

Held: Reimposing the death penalty on petitioners did not violate the Double Jeopardy Clause. Pp. 152–157.

(a) When a conviction is reversed on appeal, it is nullified and "'the slate wiped clean,'" so that if the defendant is convicted again, he may constitutionally be subjected to whatever punishment is lawful. *Bullington* v. *Missouri*, 451 U. S. 430, 442. This rationale is, however, inapplicable where a jury agrees or an appellate court decides that the prosecution "has not proved its case." *Id.*, at 443. Therefore, the relevant inquiry in these cases is whether the sentencing judge or the reviewing court has "decided that the prosecution has not proved its case"

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*Together with No. 85–5024, *Poland* v. *Arizona*, also on certiorari to the same court.

for the death penalty and hence has "acquitted" petitioners. *Bullington* v. *Missouri, supra; Arizona* v. *Rumsey*, 467 U. S. 203. Pp. 152–154.

(b) The trial judge's rejection of the "pecuniary gain" aggravating circumstance was not an "acquittal" of that circumstance for double jeopardy purposes, and did not foreclose its consideration by the reviewing court. Moreover, because the reviewing court did not find the evidence legally insufficient to justify imposition of the death penalty, there was no death penalty "acquittal" by that court. The Double Jeopardy Clause, therefore, did not foreclose a second sentencing hearing at which the "clean slate" rule applied. Pp. 154–157.

144 Ariz. 388, 698 P. 2d 183, and 144 Ariz. 412, 698 P. 2d 207, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, *post*, p. 157.

H. K. Wilhelmsen, by appointment of the Court, 474 U. S. 943, argued the cause for petitioner. With him on the brief was *Marc E. Hammond*.

Gerald R. Grant, Assistant Attorney General of Arizona, argued the cause for respondent. With him on the brief was *Robert K. Corbin*, Attorney General.

JUSTICE WHITE delivered the opinion of the Court.

The question presented is whether the Double Jeopardy Clause bars a further capital sentencing proceeding when, on appeal from a sentence of death, the reviewing court finds the evidence insufficient to support the only aggravating factor on which the sentencing judge relied, but does not find the evidence insufficient to support the death penalty.

I

In 1977 petitioners Patrick and Michael Poland, disguised as police officers, stopped a Purolator van that was making cash deliveries to various banks in northern Arizona. After removing some $281,000 in cash from the van, petitioners took the two Purolator guards to a lake and dumped them into the water in sacks weighted with rocks. Autopsies indicated that the most probable cause of the guards' death was drowning, although one may have died of a heart attack. It was not possible to determine if the guards were drugged, but there was no evidence of a struggle.

The jury disbelieved petitioners' alibi defense and convicted them of first-degree murder. Pursuant to former Ariz. Rev. Stat. Ann. § 13–454(A) (Supp. 1973), the trial judge then sat as sentencer in a separate proceeding. At the hearing, the prosecution, relying on the evidence presented at trial, argued that two statutory aggravating circumstances were present: (1) that petitioners had "committed the offense as consideration for the receipt, or in expectation of the receipt, of [something] of pecuniary value," former Ariz. Rev. Stat. Ann. § 13–454(E)(5) (Supp. 1973); and (2) that petitioners had "committed the offense in an especially heinous, cruel, or depraved manner," former Ariz. Rev. Stat. § 13–454(E)(6) (Supp. 1973). The trial judge made the following finding with respect to the "pecuniary gain" aggravating circumstance:

> "The court finds the aggravating circumstance in § 13–454 E(3) *[sic]* is not present. This presumes the legislative intent was to cover a contract killing. If this presumption is inaccurate, the evidence shows the defendants received something of pecuniary value, cash in the amount of $281,000.00.
>
> "This, then, would be an aggravating circumstance." App. 15–16.

The judge found that the "especially heinous, cruel, [or] depraved" aggravating circumstance was present, stating that the murders were "shockingly evil, insensate, and marked by debasement." *Id.*, at 16. Finding that this aggravating circumstance outweighed the mitigating evidence, the judge sentenced petitioners to death. *Id.*, at 14.

On appeal, petitioners argued that the evidence was insufficient to support the judge's finding of the "especially heinous, cruel, or depraved" aggravating circumstance. They also argued that the jury's verdict was tainted by a jury-room discussion of evidence not admitted at trial. The Arizona Supreme Court agreed that the jury's verdict was tainted, necessitating reversal and retrial. *State* v. *Poland,* 132 Ariz. 269, 283–285, 645 P. 2d 784, 798–800 (1982). The court next held that the evidence on which the State relied at the first sentencing hearing was insufficient to support a finding of the "especially heinous, cruel, or depraved" aggravating circumstance. *Id.*, at 285, 645 P. 2d, at 800. Finally, the court stated that the trial court "mistook the law when it did not find that the defendants 'committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.'" *Ibid.* The court explained that this aggravating circumstance is not limited to situations involving contract killings, see *State* v. *Clark*, 126 Ariz. 428, 616 P. 2d 888 (1980), and added that "[u]pon retrial, if the defendants are again convicted of first degree murder, the court may find the existence of this aggravating circumstance." 132 Ariz., at 286, 645 P. 2d, at 801.

On remand, petitioners were again convicted of first-degree murder. At the sentencing hearing, the prosecution, relying on the evidence presented at the second trial and also presenting additional evidence, argued that the "pecuniary gain" and "especially heinous, cruel, or depraved" aggravating factors were present in each petitioner's case. The prosecution alleged a third aggravating circumstance in petitioner Patrick Poland's case: previous conviction of "a felony . . . involving the use or threat of violence on another person," Ariz. Rev. Stat. Ann. § 13–454(E)(2) (Supp. 1973).[1] The trial judge found all of the aggravating circumstances alleged by the prosecution, and again sentenced both petitioners to death.

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[1] On October 5, 1981, petitioner Patrick Poland, in an unrelated case, was convicted of bank robbery and use of a dangerous weapon in a bank robbery.

Petitioners argued on appeal, as they had at their second sentencing hearing, that the Double Jeopardy Clause barred reimposition of the death penalty. Their theory was that the Arizona Supreme Court's decision on their first appeal that the evidence failed to support the "especially heinous, cruel, or depraved" aggravating circumstance amounted to an "acquittal" of the death penalty. Cf. *Bullington* v. *Missouri*, 451 U. S. 430 (1981); *Arizona* v. *Rumsey*, 467 U. S. 203 (1984). A majority of the Arizona Supreme Court rejected this argument, stating:

> "Our holding in *Poland I* . . . was simply that the death penalty could not be based solely upon [the 'especially heinous, cruel, or depraved'] aggravating circumstance because there was insufficient evidence to support it. This holding was not tantamount to a death penalty 'acquittal.'" *State* v. *Poland (Patrick)*, 144 Ariz. 388, 404, 698 P. 2d 183, 199 (1985).

Accord, *State* v. *Poland (Michael)*, 144 Ariz. 412, 698 P. 2d 207 (1985).

The court found the evidence still insufficient to support the "especially heinous, cruel, or depraved" aggravating circumstance, but sufficient to support the "pecuniary gain" aggravating circumstance with respect to both defendants and the "prior conviction involving violence" circumstance with respect to Patrick Poland. *State* v. *Poland (Patrick)*, *supra*, at 404–406, 698 P. 2d, at 199–201; accord, *State* v. *Poland (Michael)*, *supra*. After again reviewing and independently weighing the mitigating and aggravating circumstances, the court concluded that the death penalty was appropriate in each petitioner's case. We granted certiorari to consider whether reimposing the death penalties on petitioners violated the Double Jeopardy Clause. 474 U. S. 816 (1985). We hold that it did not.

II

In *Bullington* v. *Missouri, supra,* this Court held that a defendant sentenced to life imprisonment by a capital sentencing jury is protected by the Double Jeopardy Clause against imposition of the death penalty in the event that he obtains reversal of his conviction and is retried and reconvicted. The Court recognized the usual rule to be that when a defendant obtains reversal of his conviction on appeal,

> "the original conviction has been nullified and 'the slate wiped clean.' Therefore, if the defendant is convicted again, he constitutionally may be subjected to whatever punishment is lawful, subject only to the limitation that he receive credit for time served." *Id.*, at 442 (quoting *North Carolina* v. *Pearce*, 395 U. S. 711, 721 (1969)).

However, the Court found that its prior decisions had created an exception to this rule: "[T]he 'clean slate' rationale . . . is inapplicable whenever a jury agrees or an appellate court decides that the prosecution has not proved its case." *Bullington*, 451 U. S., at 443.[2] Although it is usually "impossible to conclude that a sentence less than the statutory maximum 'constitute[s] a decision to the effect that the government has failed to prove its case,'" *ibid.* (quoting *Burks* v. *United States*, 437 U. S. 1, 15 (1978)), the Court found that Missouri, by "enacting a capital sentencing procedure that resembles a trial on the issue of guilt or innocence, . . . *explicitly requires* the jury to determine whether the prosecution has 'proved its case,'" *id.*, at 444 (emphasis in original).[3] Accordingly, the Court held that the jury's decision to sentence Bullington to life imprisonment after his first conviction should be treated as an "acquittal" of the death penalty under the Double Jeopardy Clause.

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[2] Thus, a defendant charged with first-degree murder but only convicted of the lesser included offense of second-degree murder has been acquitted of the greater charge for purposes of the Double Jeopardy Clause. In the event his conviction is reversed on appeal, "a retrial on the first-degree murder charge [is] barred by the Double Jeopardy Clause, because the defendant 'was forced to run the gantlet once on that charge and the jury refused to convict him.'" *Bullington*, 451 U. S., at 443 (quoting *Green* v. *United States*, 355 U. S. 184, 190 (1957)).

Also, when a defendant's conviction is overturned on appeal on the grounds that the evidence was insufficient to convict, the Double Jeopardy Clause forbids a retrial. "'Since we necessarily accord absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.'" *Bullington, supra,* at 442–443 (quoting *Burks* v. *United States*, 437 U. S. 1, 16 (1978)).

Recently, the Court held that the rationale of *Bullington* applies to the Arizona capital sentencing scheme at issue in this case. *Arizona* v. *Rumsey*, *supra*.[4] In *Rumsey*, the

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[3] The "case" to which the Court referred in *Bullington* was the prosecution's case that the defendant deserved the death penalty. The analogy drawn was between a death sentence and a verdict of guilty, a life sentence and a verdict of innocent. The Court emphasized that the sentencer was required to make a choice between "two alternative verdicts," 451 U. S., at 438, a statement inconsistent with the view that for double jeopardy purposes the capital sentencer should be seen as rendering a series of miniverdicts on each aggravating circumstance. See also *Arizona* v. *Rumsey*, 467 U. S. 203, 209–210 (1984) ("The sentencer—the trial judge in Arizona—is required to choose between two options: death, and life imprisonment without possibility of parole for 25 years").

[4] The Court explained the similarities between the Arizona and Missouri systems as follows:

"The capital sentencing proceeding in Arizona shares the characteristics of the Missouri proceeding that make it resemble a trial for purposes of the Double Jeopardy Clause. The sentencer—the trial judge in Arizona—is required to choose between two options: death, and life imprisonment without possibility of parole for 25 years. The sentencer must make the decision guided by detailed statutory standards defining aggravating and mitigating circumstances; in particular, death may not be imposed unless at least one aggravating circumstance is found, whereas death must be imposed if there is one aggravating circumstance and no mitigating circumstance sufficiently substantial to call for leniency. The sentencer must make findings with respect to each of the statutory aggravating and mitigating circumstances, and the sentencing hearing involves the submission of evidence and the presentation of argument. The usual rules of evidence trial judge erred in exactly the same way as the trial judge did at petitioners' first sentencing hearing in these cases, by construing the "pecuniary gain" aggravating circumstance as limited to "murder for hire" situations. Unlike the trial judge in this case, however, the trial judge in *Rumsey* found no aggravating circumstances, and entered a sentence of life imprisonment. This Court held that "[t]he double jeopardy principle relevant to [Rumsey's] case is the same as that invoked in *Bullington:* an acquittal on the merits by the sole decisionmaker in the proceeding is final and bars retrial on the same charge." *Id.*, at 211.

Under *Bullington* and *Rumsey*, therefore, the relevant inquiry in the cases before us is whether the sentencing judge or the reviewing court has "decid[ed] that the prosecution has not proved its case" for the death penalty and hence has "acquitted" petitioners. *Bullington*, 451 U. S., at 443.

III

At no point during petitioners' first capital sentencing hearing and appeal did either the sentencer or the reviewing court hold that the prosecution had "failed to prove its case" that petitioners deserved the death penalty. Plainly, the sentencing judge did not acquit, for he imposed the death penalty. While the Arizona Supreme Court held that the sentencing judge erred in relying on the "especially heinous, cruel, or depraved" aggravating circumstance, it did not hold that the prosecution had failed to prove its case for the death penalty. Indeed, the court clearly indicated that there had been no such failure by remarking that "the trial court mistook the law when it did not find that the defendants 'committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value,'" and that

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govern the admission of evidence of aggravating circumstances, and the State must prove the existence of aggravating circumstances beyond a reasonable doubt. . . . [T]hese characteristics make the Arizona capital sentencing proceeding indistinguishable for double jeopardy purposes from the capital sentencing proceeding in Missouri." *Ibid.* (citations omitted).

"[u]pon retrial, if the defendants are again convicted of first degree murder, the court may find the existence of this aggravating circumstance," 132 Ariz., at 286, 645 P. 2d, at 800, 801.

Petitioners argue, however, that the Arizona Supreme Court "acquitted" them of the death penalty by finding the "evidence [insufficient] to support the sole aggravating circumstances found by the sentencer." Brief for Petitioners 16. Petitioners' implicit argument is, first, that the sentencing judge "acquitted" them of the "pecuniary gain" aggravating circumstance, and second, that the Double Jeopardy Clause rendered this "acquittal" final, so that the evidence relating to this circumstance was effectively removed from the case at the time of petitioners' first appeal.[5]

We reject the fundamental premise of petitioners' argument, namely, that a capital sentencer's failure to find a particular aggravating circumstance alleged by the prosecution always constitutes an "acquittal" of that circumstance for double jeopardy purposes. *Bullington* indicates that the proper inquiry is whether the sentencer or reviewing court has "decided that the prosecution has not proved its case" *that the death penalty is appropriate.*[6] We are not prepared to extend *Bullington* further and view the capital sentencing hearing as a set of minitrials on the existence of each aggravating circumstance. Such an approach would push the analogy on which *Bullington* is based past the breaking point.

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[5] Petitioners have not made this argument with any clarity, but we can discern no other plausible basis for their contention that the Arizona Supreme Court "acquitted" them of the death penalty at the time of their first appeal. Any suggestion that the court *intended* to acquit them is negated by the language in *Poland I* and is rendered even more untenable by the court's statement at the time of the second appeal that "[o]ur holding in *Poland I,* however, was . . . not tantamount to a death penalty 'acquittal.'" *State* v. *Poland,* 144 Ariz., at 404, 698 P. 2d, at 199.

Petitioners seem to attach importance to the fact that the prosecution did not cross-appeal the trial judge's finding regarding the "pecuniary gain" aggravating circumstance. However, the Arizona Supreme Court did not accord any significance to the prosecution's failure to cross-appeal, and we certainly cannot say that as a matter of state law the court was precluded from considering the evidence regarding the "pecuniary gain" aggravating circumstance.

[6] See n. 3, *supra.*

Aggravating circumstances are not separate penalties or offenses, but are "standards to guide the making of [the] choice" between the alternative verdicts of death and life imprisonment. 451 U. S., at 438. Thus, under Arizona's capital sentencing scheme, the judge's finding of any particular aggravating circumstance does not of itself "convict" a defendant (*i. e.*, require the death penalty), and the failure to find any particular aggravating circumstance does not "acquit" a defendant (*i. e.*, preclude the death penalty).

It is true that the sentencer must find *some* aggravating circumstance before the death penalty may be imposed, and that the sentencer's finding, albeit erroneous, that no aggravating circumstance is present is an "acquittal" barring a second death sentence proceeding. *Arizona* v. *Rumsey*, 467 U. S. 203 (1984). This is because

> "the law attaches particular significance to an acquittal. To permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent he may be found guilty.'" *United States* v. *Scott*, 437 U. S. 82, 91 (1978) (quoting *Green* v. *United States*, 355 U. S. 184, 188 (1957)).

This concern with protecting the finality of acquittals is not implicated when, as in these cases, a defendant is sentenced to death, *i. e.*, "convicted." There is no cause to shield such a defendant from further litigation; further litigation is the only hope he has. The defendant may argue on appeal that the evidence presented at his sentencing hearing was as a matter of law insufficient to support the aggravating circumstances on which his death sentence was based, but the Double Jeopardy Clause does not require the reviewing court, if it sustains that claim, to ignore evidence in the record supporting another aggravating circumstance which the sentencer has erroneously rejected. Such a rule would have the odd and unacceptable result of requiring a reviewing court to enter a death penalty "acquittal" even though that court is of the view that the State has "proved its case." Our decisions in *Burks* and *Bullington* do not support such a rule, which would certainly give the prosecution cause to "complain of prejudice." *Burks*, 437 U. S., at 16. We hold, therefore, that the trial judge's rejection of the "pecuniary gain" aggravating circumstance in this case was not an "acquittal" of that circumstance for double jeopardy purposes, and did not foreclose its consideration by the reviewing court. Furthermore, because the reviewing court did not find the evidence legally insufficient to justify imposition of the death penalty, there was no death penalty "acquittal" by that court. The Double Jeopardy Clause, therefore, did not foreclose a second sentencing hearing at which the "clean slate" rule applied.

The judgment of the Supreme Court of Arizona is

Affirmed.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, dissenting.

There is one difference between these cases and *Arizona* v. *Rumsey*, 467 U. S. 203 (1984), in which seven Members of this Court interpreted the Double Jeopardy Clause to bar imposition of a death sentence after a life sentence has been reversed on appeal: the sentencing judge in petitioners' cases made two errors of state law, while Rumsey's judge made only one. According to the majority, that makes the difference between life and death.

In *Rumsey*, the defendant was convicted of murder and robbery; the trial judge sentenced him to life imprisonment upon finding that none of the statutory aggravating circumstances provided by Arizona law applied to the defendant's case. One of those aggravating circumstances—murder committed as consideration for pecuniary gain—the court rejected in the belief that it applied only to murders for hire. On appeal, the Supreme Court of Arizona held that murder for pecuniary gain could also include murder in the course of a robbery. Accordingly, it set aside Rumsey's life sentence and remanded for resentencing. This time, Rumsey was given a death sentence, supported by the aggravating circumstance of murder for pecuniary gain. On writ of certiorari, this Court concluded that the Arizona death-sentencing procedure is equivalent to a trial for purposes of the Double Jeopardy Clause, under the doctrine of *Bullington* v. *Missouri*, 451 U. S. 430 (1981). We then concluded that Rumsey's initial life sentence had constituted an "acquittal" on the merits of the central issue of the proceeding: whether death was the appropriate punishment for the offense. Under traditional double jeopardy principles, retrial of that issue was thereafter precluded, even though the "acquittal" was predicated upon a mistaken interpretation of state law. *Rumsey*, *supra*, at 211.

Petitioners, Patrick and Michael Poland, were convicted of the murders of two guards in the course of a robbery. Like the trial court in *Rumsey*, the sentencing court rejected the aggravating circumstance of murder for pecuniary gain, believing that it applied only to murders for hire. Unlike the *Rumsey* court, however, the trial judge did not then impose a life sentence. Instead, he concluded that another of the statutory aggravating circumstances was present: that the murders were "especially heinous, cruel, or depraved." Based on this sole aggravating circumstance, therefore, the court sentenced petitioners to death. On joint appeal, the Arizona Supreme Court reviewed the death sentences and concluded that the evidence was insufficient as a matter of state law to establish that the murders had been "especially heinous, cruel, or depraved," because the State had not proved that the victims had suffered, as state law requires. App. 61. Before remanding, however, the court took the opportunity, *sua sponte*, to note that murder for pecuniary gain was not limited to murders for hire, and therefore was available as a possible alternative basis for a death sentence. On remand, the trial court once more sentenced petitioners to death, again concluding that the murders were "especially heinous, cruel, or depraved," and also that they were committed for pecuniary gain.* The Arizona Supreme Court again reversed the aggravating circumstance of "especially heinous, cruel, or depraved," but this time upheld the death sentences on the ground of pecuniary gain.

The Court makes much of the fact that, unlike Rumsey, petitioners never received sentences of life imprisonment. Yet the majority fails to recognize the teaching of *Burks* v. *United States*, 437 U. S. 1 (1978). In *Burks*, we held that an appellate reversal of a conviction, based on the legal conclusion that the evidence was insufficient to support the verdict, has the same effect under the Double Jeopardy Clause as an acquittal at trial. *Id.*, at 16. "To hold otherwise," the Court concluded, "would create a purely arbitrary distinction between those in petitioner's position and others who would enjoy the benefit of a correct decision by the District Court." *Id.*, at 11. That arbitrary distinction is precisely the one that the Court creates today. The initial death sentences that petitioners received were "convictions," see *Rumsey*, *supra*, and their reversal for insufficiency of the evidence to support the sole aggravating circumstance found by the sentencing judge must, under *Burks*, be accorded the same effect as an "acquittal" at trial—the same effect as Rumsey's life sentence. As much as Rumsey's life sentence constituted the all-important "acquittal on the merits," even though predicated on an error of law, so, too, did the reversal of petitioners' death sentences.

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*With respect to petitioner Patrick Poland, an additional aggravating factor was invoked to support the second death sentence, based on events subsequent to the first penalty proceeding.

The analogy, first drawn in *Bullington* v. *Missouri*, *supra*, between an acquittal at trial and an "acquittal" of death at sentencing, is not perfect, and the imperfections perhaps can explain the majority's mischaracterization of the issue in these cases. At trial, a defendant is charged with an offense containing certain specified elements; he is either convicted or acquitted of that offense, the trier of fact having concluded that the prosecution has or has not proved all the elements of the offense. The sentencing proceeding, however, is quite different. In Arizona, for example, a death sentence may be imposed if any one of seven statutory aggravating factors is proved. While it might be possible to treat each aggravating circumstance as a separate "offense," of which a defendant is either convicted or acquitted, this Court has taken a different approach. We have said that "on the merits" of a capital proceeding, the "central issue [is] whether death was the appropriate punishment for [the] offense." *Rumsey*, 467 U. S., at 211. Thus, the "offense" for which the defendant receives his "conviction" or "acquittal" is that of the appropriateness of the death penalty, not the elements of any particular aggravating factor. *Ante*, at 153, n. 3.

In these cases, the trial judge found death to be the appropriate punishment because petitioners' offenses were "especially heinous, cruel, or depraved." On appeal, the Arizona Supreme Court held that the sole basis offered by the trial court to support its "conviction" of petitioners was insufficient as a matter of law.

The majority believes that, since other aggravating circumstances might have been found to support the "convictions," it was permissible to remand the cases for further factfinding on those alternative factors. But this overlooks what our cases have said a conviction *is* in the sentencing context—a determination that death is the appropriate penalty, not separate trials on the existence of all statutory aggravating circumstances, conducted *seriatim*. In these cases, that determination was reversed because there was insufficient evidence to support the ground relied on by the trial judge in reaching it. Any remand for further factfinding on the question whether the death sentence should be imposed was thereafter prohibited. See *Rumsey*, *supra*, at 211–212. In no other circumstance would the Double Jeopardy Clause countenance the offer of a second chance to the State and the trial judge to find a better theory upon which to base a conviction. Nor should it do so here. I dissent.

LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTIONS *v.* McCREE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 84–1865. Argued January 13, 1986—Decided May 5, 1986

At respondent's Arkansas state-court trial for capital felony murder, the judge at *voir dire* removed for cause, over respondent's objections, those prospective jurors who stated that they could not under any circumstances vote for the imposition of the death penalty—that is, so-called "*Witherspoon*-excludables" under the principles of *Witherspoon* v. *Illinois*, 391 U. S. 510. The jury convicted respondent, but at the sentencing phase of the trial it rejected the State's request for the death penalty and set punishment at life imprisonment without parole. The conviction was affirmed on appeal, and respondent's petition for state postconviction relief was denied. He then sought federal habeas corpus relief, contending that the "death qualification" of the jury by the removal for cause of the "*Witherspoon*-excludables" violated his rights under the Sixth and Fourteenth Amendments to have his guilt or innocence determined by an impartial jury selected from a representative cross section of the community. The District Court ruled that "death qualification" of the jury prior to the guilt phase of the bifurcated trial violated both the fair-cross-section and the impartiality requirements of the Constitution. The Court of Appeals affirmed on the ground that removal for cause of "*Witherspoon*-excludables" violated respondent's Sixth Amendment right to a jury selected from a fair cross section of the community.

Held: The Constitution does not prohibit the removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of the trial. This is so even assuming, *arguendo*, that the social science studies introduced in the courts below were adequate to establish that "death qualification" in fact produces juries somewhat more "conviction-prone" than "non-death-qualified" juries. Pp. 173–183.

(a) "Death qualification" of a jury does not violate the fair-cross-section requirement of the Sixth Amendment, which applies to jury panels or venires but does not require that petit juries actually chosen reflect the composition of the community at large. Even if the requirement were extended to petit juries, the essence of a fair-cross-section claim is the systematic exclusion of a "distinctive group" in the community—such as blacks, women, and Mexican-Americans—for reasons completely unrelated to the ability of members of the group to serve as jurors in a particular case. Groups defined solely in terms of shared attitudes that would prevent or substantially impair members of the group from performing one of their duties as jurors, such as the "*Witherspoon*-excludables" at issue here, are not "distinctive groups" for fair-cross-section purposes. "Death qualification" is carefully designed to serve the State's legitimate interest in obtaining a single jury that can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases of a capital trial. Pp. 173–177.

(b) Nor does "death qualification" of a jury violate the constitutional right to an impartial jury on the theory asserted by respondent that, because all individual jurors are to some extent predisposed towards one result or another, a constitutionally impartial jury can be constructed only by "balancing" the various predispositions of the individual jurors, and when the State "tips the scales" by excluding prospective jurors with a particular viewpoint, an impermissibly partial jury results. An impartial jury consists of nothing more than jurors who will conscientiously apply the law and find the facts. Respondent's view of jury impartiality is both illogical and impractical. Neither *Witherspoon*, *supra*, nor *Adams* v. *Texas*, 448 U. S. 38, supports respondent's contention that a State violates the Constitution whenever it "slants" the jury by excluding a group of individuals more likely than the population at large to favor the defendant. Here, the removal for cause of "*Witherspoon*-excludables" serves the State's entirely proper interest in obtaining a single jury (as required by Arkansas law) that could impartially decide all of the issues at both the guilt and the penalty phases of respondent's trial. Moreover, both *Witherspoon* and *Adams* dealt with the special context of capital sentencing, where the range of jury discretion necessarily gave rise to far greater concern over the effects of an "imbalanced" jury. The case at bar, by contrast, deals not with capital sentencing, but with the jury's more traditional role of finding the facts and determining the guilt or innocence of a criminal defendant, where jury discretion is more channeled. Pp. 177–183.

758 F. 2d 226, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and O'CONNOR, JJ., joined. BLACKMUN, J., concurred in the result. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and STEVENS, JJ., joined, *post*, p. 184.

John Steven Clark, Attorney General of Arkansas, argued the cause for petitioner. With him on the briefs were *Jack*

Gillean, Assistant Attorney General, *Victra L. Fewell*, and *Leslie M. Powell*.

Samuel R. Gross argued the cause for respondent. With him on the brief were *John Charles Boger*, *James S. Liebman*, *William R. Wilson, Jr.*, and *Anthony G. Amsterdam*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Alabama et al. by *Susan Crump*, *David Crump*, *Charles K. Graddick*, Attorney General of Alabama, *John J. Kelly*, Chief State's Attorney of Connecticut, *Jim Smith*, Attorney General of Florida, *Michael J. Bowers*, Attorney General of Georgia, *James Thomas Jones*, Attorney General of Idaho, *Neil F. Hartigan*, Attorney General of Illinois, *Linley E. Pearson*, Attorney General of Indiana, *Edwin Lloyd Pittman*, Attorney General of Mississippi, *William L. Webster*, Attorney General of Missouri, *Irwin I. Kimmelman*, Attorney General of New Jersey, *Paul Bardacke*, Attorney General of New Mexico, *David B. Frohnmayer*, Attorney General of Oregon, *Mark V. Meierhenry*, Attorney General of South Dakota, *Jim Mattox*, Attorney General of Texas, *Kenneth O. Eikenberry*, Attorney General of Washington, and *Stephen E. Merrill*, Attorney General of New Hampshire; and for the State of Arizona et al. by *Michael C. Turpen*, Attorney General of Oklahoma, and *David W. Lee*, *Hugh A. Manning*, *Tomilou Gentry Liddell*, *Robert A. Nance*, and *Jean M. LeBlanc*, Assistant Attorneys General, *Robert K. Corbin*, Attorney General of Arizona, *John Van de Kamp*, Attorney General of California, *Charles M. Oberly*, Attorney General of Delaware, *David L. Armstrong*, Attorney General of Kentucky, *William J. Guste, Jr.*, Attorney General of Louisiana, *Stephen H. Sachs*, Attorney General of Maryland, *Robert M. Spire*, Attorney General of Nebraska, *Brian McKay*, Attorney General of Nevada, *Stephen E. Merrill*, Attorney General of New Hampshire, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *LeRoy S. Zimmerman*, Attorney General of Pennsylvania, *Travis Medlock*, Attorney General of South Carolina, *W. J. Michael Cody*, Attorney General of Tennessee, *David L. Wilkinson*, Attorney General of Utah, *William G. Broaddus*, Attorney General of Virginia, and *Archie G. McClintock*, Attorney General of Wyoming.

Briefs of *amici curiae* urging affirmance were filed for the National Center on Institutions and Alternatives by *Allan Blumstein* and *Eric M. Freedman;* for Robert Popper et al. by *Robert Popper, pro se;* and for Billy Junior Woodward by *Reed E. Hundt* and *Thomas M. Carpenter*.

Donald N. Bersoff filed a brief for the American Psychological Association as *amicus curiae*.

JUSTICE REHNQUIST delivered the opinion of the Court.

In this case we address the question left open by our decision nearly 18 years ago in *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968): Does the Constitution prohibit the removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of the trial? See *id.*, at 520, n. 18; *Bumper* v. *North Carolina*, 391 U. S. 543, 545 (1968). We hold that it does not.

Respondent Ardia McCree filed a habeas corpus petition in the United States District Court for the Eastern District of Arkansas claiming that such removal for cause violated the Sixth and Fourteenth Amendments and, after McCree's case was consolidated with another habeas case involving the same claim on remand from the Court of Appeals for the Eighth Circuit, the District Court ruled in McCree's favor and granted habeas relief. *Grigsby* v. *Mabry*, 569 F. Supp. 1273 (1983). A sharply divided Eighth Circuit affirmed, *Grigsby* v. *Mabry*, 758 F. 2d 226 (1985) (en banc), creating a conflict with recent decisions of the Fourth, Fifth, Seventh, and Eleventh Circuits. See *Keeten* v. *Garrison*, 742 F. 2d 129, 133–135 (CA4 1984), cert. pending, No. 84–6187; *Smith* v. *Balkcom*, 660 F. 2d 573, 576–578 (CA5 1981), modified on other grounds, 671 F. 2d 858, cert. denied *sub nom. Tison* v. *Arizona*, 459 U. S. 882 (1982); *Spinkellink* v. *Wainwright*, 578 F. 2d 582, 594 (CA5 1978), cert. denied, 440 U. S. 976 (1979); *United States ex rel. Clark* v. *Fike*, 538 F. 2d 750, 761–762 (CA7 1976), cert. denied, 429 U. S. 1064 (1977); and *Corn* v. *Zant*, 708 F. 2d 549, 564 (CA11 1983), cert. denied, 467 U. S. 1220 (1984). We granted certiorari to resolve the conflict, 474 U. S. 816 (1985), and now reverse the judgment of the Eighth Circuit.

On the morning of February 14, 1978, a combination gift shop and service station in Camden, Arkansas, was robbed, and Evelyn Boughton, the owner, was shot and killed. That afternoon, Ardia McCree was arrested in Hot Springs, Arkansas, after a police officer saw him driving a maroon and white Lincoln Continental matching an eyewitness' description of the getaway car used by Boughton's killer. The next evening, McCree admitted to police that he had been at Boughton's shop at the time of the murder. He claimed, however, that a tall black stranger wearing an overcoat first asked him for a ride, then took McCree's rifle out of the back of the car and used it to kill Boughton. McCree also claimed that, after the murder, the stranger rode with McCree to a nearby dirt road, got out of the car, and walked away with the rifle. McCree's story was contradicted by two eyewitnesses who saw McCree's car between the time of the murder and the time when McCree said the stranger got out and walked away, and who stated that they saw only one person in the car. The police found McCree's rifle and a bank bag from Boughton's shop alongside the dirt road. Based on ballistics tests, a Federal Bureau of Investigation officer testified that the bullet that killed Boughton had been fired from McCree's rifle.

McCree was charged with capital felony murder in violation of Ark. Stat. Ann. §41-1501(1)(a) (1977). In accordance with Arkansas law, see *Neal* v. *State*, 259 Ark. 27, 31, 531 S. W. 2d 17, 21 (1975), the trial judge at *voir dire* removed for cause, over McCree's objections, those prospective jurors who stated that they could not under any circumstances vote for the imposition of the death penalty. Eight prospective jurors were excluded for this reason. The jury convicted McCree of capital felony murder, but rejected the State's request for the death penalty, instead setting McCree's punishment at life imprisonment without parole. McCree's conviction was affirmed on direct appeal, *McCree* v. *State*, 266 Ark. 465, 585 S. W. 2d 938 (1979), and his petition for state postconviction relief was denied.

McCree then filed a federal habeas corpus petition raising, *inter alia*, the claim that "death qualification," or the removal for cause of the so-called "*Witherspoon*-excludable" prospective jurors,[1] violated his right under the Sixth and Fourteenth Amendments to have his guilt or innocence determined by an impartial jury selected from a representative cross section of the community. By stipulation of the parties, this claim was consolidated with another pending habeas case involving the same claim, which had been remanded by the Eighth Circuit for an evidentiary hearing in the District Court. App. 9–11; *Grigsby* v. *Mabry*, 637 F. 2d 525 (1980). The District Court denied the remainder of McCree's petition, and the Eighth Circuit affirmed. *McCree* v. *Housewright*, 689 F. 2d 797 (1982), cert. denied, 460 U. S. 1088 (1983).

The District Court held a hearing on the "death qualification" issue in July 1981, receiving in evidence numerous social science studies concerning the attitudes and beliefs of "*Witherspoon*-excludables," along with the potential effects of excluding them from the jury prior to the guilt phase of a bifurcated capital trial. In August 1983, the court concluded, based on the social science evidence, that "death qualification" produced juries that "were more prone to convict" capital defendants than "non-death-qualified" juries. *Grigsby* v. *Mabry*, 569 F. Supp., at 1323. The court ruled that "death qualification" thus violated both the fair-cross-section and impartiality requirements of the Sixth and Fourteenth Amendments, and granted McCree habeas relief. *Id.*, at 1324.[2]

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[1] In *Wainwright* v. *Witt*, 469 U. S. 412 (1985), this Court emphasized that the Constitution does not require "ritualistic adherence" to the "talismanic" standard for juror exclusion set forth in footnote 21 of the *Witherspoon* opinion. 469 U. S., at 419, 423. Rather, the proper constitutional standard is simply whether a prospective juror's views would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Id.*, at 433, quoting *Adams* v. *Texas*, 448 U. S. 38, 45 (1980). Thus, the term "*Witherspoon*-excludable" is something of a misnomer. Nevertheless, because the parties and the courts below have used the term "*Witherspoon*-excludables" to identify the group of prospective jurors at issue in this case, we will use the same term in this opinion.

The Eighth Circuit found "substantial evidentiary support" for the District Court's conclusion that the removal for cause of "*Witherspoon*-excludables" resulted in "conviction-prone" juries, and affirmed the grant of habeas relief on the ground that such removal for cause violated McCree's constitutional right to a jury selected from a fair cross section of the community. *Grigsby* v. *Mabry*, 758 F. 2d, at 229. The Eighth Circuit did not address McCree's impartiality claim. *Ibid.* The Eighth Circuit left it up to the discretion of the State "to construct a fair process" for future capital trials that would comply with the Sixth Amendment. *Id.*, at 242–243. Four judges dissented. *Id.*, at 243–251.

Before turning to the legal issues in the case, we are constrained to point out what we believe to be several serious flaws in the evidence upon which the courts below reached the conclusion that "death qualification" produces "conviction-prone" juries.[3] McCree introduced into evidence some 15 social science studies in support of his constitutional claims, but only 6 of the studies even purported to measure the potential effects on the guilt-innocence determination of the removal from the jury of "*Witherspoon*-excludables."[4] Eight of the remaining nine studies dealt solely with generalized attitudes and beliefs about the death penalty and other aspects of the criminal justice system, and were thus, at best, only marginally relevant to the constitutionality of McCree's conviction.[5] The 15th and final study

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[2] James Grigsby, the habeas petitioner with whose case McCree's had been consolidated, died prior to the District Court's decision, so his case became moot. *Grigsby* v. *Mabry*, 569 F. Supp., at 1277, n. 2. Dewayne Hulsey, a third habeas petitioner whose "death qualification" claim was consolidated with Grigsby's and McCree's, was found to be procedurally barred, under *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), from asserting the claim. *Hulsey* v. *Sargent*, 550 F. Supp. 179 (ED Ark. 1981).

[3] McCree argues that the "factual" findings of the District Court and the Eighth Circuit on the effects of "death qualification" may be reviewed by this Court only under the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a). Because we do not ultimately base our decision today on the invalidity of the lower courts' "factual" findings, we need not decide the "standard of review" issue. We are far from persuaded, however, that the "clearly erroneous" standard of Rule 52(a) applies to the kind of "legislative" facts at issue here. See generally *Dunagin* v. *City of Oxford, Mississippi*, 718 F. 2d 738, 748, n. 8 (CA5 1983) (en banc) (plurality opinion of Reavley, J.). The difficulty with applying such a standard to

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"legislative" facts is evidenced here by the fact that at least one other Court of Appeals, reviewing the same social science studies as introduced by McCree, has reached a conclusion contrary to that of the Eighth Circuit. See *Keeten* v. *Garrison*, 742 F. 2d 129, 133, n. 7 (CA4 1984) (disagreeing that studies show relationship between generalized attitudes and behavior as jurors), cert. pending, No. 84–6187.

[4] The Court of Appeals described the following studies as "conviction-proneness surveys": H. Zeisel, Some Data on Juror Attitudes Toward Capital Punishment (University of Chicago Monograph 1968) (Zeisel); W. Wilson, Belief in Capital Punishment and Jury Performance (unpublished manuscript, University of Texas, 1964) (Wilson); Goldberg, Toward Expansion of *Witherspoon:* Capital Scruples, Jury Bias, and Use of Psychological Data to Raise Presumptions in the Law, 5 Harv. Civ. Rights-Civ. Lib. L. Rev. 53 (1970) (Goldberg); Jurow, New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process, 84 Harv. L. Rev. 567 (1971) (Jurow); and Cowan, Thompson, & Ellsworth, The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation, 8 Law & Hum. Behav. 53 (1984) (Cowan-Deliberation). In addition, McCree introduced evidence on this issue from a Harris Survey conducted in 1971. Louis Harris & Associates, Inc., Study No. 2016 (1971) (Harris-1971).

[5] The Court of Appeals described the following studies as "attitudinal and demographic surveys": Bronson, On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen, 42 U. Colo. L. Rev. 1 (1970); Bronson, Does the Exclusion of Scrupled Jurors in Capital Cases Make the Jury More Likely to Convict? Some Evidence from California, 3 Woodrow Wilson L. J. 11 (1980); Fitzgerald & Ellsworth, Due Process vs. Crime Control: Death Qualification and Jury Attitudes, 8 Law & Hum. Behav. 31 (1984); and Precision Research, Inc., Survey No. 1286 (1981). In addition, McCree introduced evidence on these issues from Thompson, Cowan, Ellsworth, & Har-

dealt with the effects on prospective jurors of *voir dire* questioning about their attitudes toward the death penalty,[6] an issue McCree raised in his brief to this Court but that counsel for McCree admitted at oral argument would not, standing alone, give rise to a constitutional violation.[7]

Of the six studies introduced by McCree that at least purported to deal with the central issue in this case, namely, the potential effects on the determination of guilt or innocence of excluding "*Witherspoon*-excludables" from the jury, three were also before this Court when it decided *Witherspoon*.[8] There, this Court reviewed the studies and concluded:

> "The data adduced by the petitioner . . . are too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt. We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors

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rington, Death Penalty Attitudes and Conviction Proneness, 8 Law & Hum. Behav. 95 (1984); Ellsworth, Bukaty, Cowan, & Thompson, The Death-Qualified Jury and the Defense of Insanity, 8 Law & Hum. Behav. 81 (1984); A. Young, Arkansas Archival Study (unpublished, 1981); and various Harris, Gallup, and National Opinion Research Center polls conducted between 1953 and 1981.

[6] McCree introduced evidence on this issue from Haney, On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process, 8 Law & Hum. Behav. 121 (1984).

[7] We would in any event reject the argument that the very process of questioning prospective jurors at *voir dire* about their views of the death penalty violates the Constitution. McCree concedes that the State may challenge for cause prospective jurors whose opposition to the death penalty is so strong that it would prevent them from impartially determining a capital defendant's guilt or innocence. *Ipso facto*, the State must be given the opportunity to identify such prospective jurors by questioning them at *voir dire* about their views of the death penalty.

[8] The petitioner in *Witherspoon* cited the Wilson and Goldberg studies, and a prepublication draft of the Zeisel study. 391 U. S., at 517, n. 10; see n. 4, *supra*.

> opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. In light of the presently available information, we are not prepared to announce a *per se* constitutional rule requiring the reversal of every conviction returned by a jury selected as this one was." 391 U. S. at 517–518 (footnote omitted).

It goes almost without saying that if these studies were "too tentative and fragmentary" to make out a claim of constitutional error in 1968, the same studies, unchanged but for having aged some 18 years, are still insufficient to make out such a claim in this case.

Nor do the three post-*Witherspoon* studies introduced by McCree on the "death qualification" issue provide substantial support for the "*per se* constitutional rule" McCree asks this Court to adopt. All three of the "new" studies were based on the responses of individuals randomly selected from some segment of the population, but who were not actual jurors sworn under oath to apply the law to the facts of an actual case involving the fate of an actual capital defendant.[9] We have serious doubts about the value of these studies in predicting the behavior of actual jurors. See *Grigsby* v. *Mabry*, 758 F. 2d, at 248, n. 7 (J. Gibson, J., dissenting). In addition, two of the three "new" studies did not even attempt to simulate the process of jury deliberation,[10] and none of the "new" studies was able to predict to what extent, if any, the presence of one or more "*Witherspoon*-excludables" on a guilt-phase jury would have altered the outcome of the guilt determination.[11]

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[9] The Harris-1971 study polled 2,068 adults from throughout the United States, the Cowan-Deliberation study involved 288 jury-eligible residents of San Mateo and Santa Clara Counties in California, and the Jurow study was based on the responses of 211 employees of the Sperry Rand Corporation in New York.

[10] The Harris-1971 and Jurow studies did not allow for group deliberation, but rather measured only individual responses.

Finally, and most importantly, only one of the six "death qualification" studies introduced by McCree even attempted to identify and account for the presence of so-called "nullifiers," or individuals who, because of their deep-seated opposition to the death penalty, would be unable to decide a capital defendant's guilt or innocence fairly and impartially.[12] McCree concedes, as he must, that "nullifiers" may properly be excluded from the guilt-phase jury, and studies that fail to take into account the presence of such "nullifiers" thus are fatally flawed.[13] Surely a "*per se* constitutional rule" as far reaching as the one McCree proposes should not be based on the results of the lone study that avoids this fundamental flaw.

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[11] JUSTICE MARSHALL's dissent refers to an "essential unanimity" of support among social science researchers and other academics for McCree's assertion that "death qualification" has a significant effect on the outcome of jury deliberations at the guilt phase of capital trials. See *post*, at 189. At least one of the articles relied upon by the dissent candidly acknowledges, however, that its conclusions ultimately must rest on "[a] certain amount of . . . conjecture" and a willingness "to transform behavioral suspicions into doctrine." Finch & Ferraro, The Empirical Challenge to Death-Qualified Juries: On Further Examination, 65 Neb. L. Rev. 21, 67 (1986). As the authors of the article explain:

"[U]ncertainty inheres in every aspect of the capital jury's operation, whether one focuses on the method of identifying excludable jurors or the deliberative process through which verdicts are reached. So it is that, some seventeen years after *Witherspoon*, no definitive conclusions can be stated as to the frequency or the magnitude of the effects of death qualification.

. . . . .

"Nor is it likely that further empirical research can add significantly to the current understanding of death qualification. The true magnitude of the phenomenon of conviction proneness is probably unmeasurable, given the complexity of capital cases and capital adjudication." *Id.*, at 66–67 (footnote omitted).

[12] Only the Cowan-Deliberation study attempted to take into account the presence of "nullifiers."

[13] The effect of this flaw on the outcome of a particular study is likely to be significant. The Cowan-Deliberation study revealed that approximately 37% of the "*Witherspoon*-excludables" identified in the study were also "nullifiers."

Having identified some of the more serious problems with McCree's studies, however, we will assume for purposes of this opinion that the studies are both methodologically valid and adequate to establish that "death qualification" in fact produces juries somewhat more "conviction-prone" than "non-death-qualified" juries. We hold, nonetheless, that the Constitution does not prohibit the States from "death qualifying" juries in capital cases.

The Eighth Circuit ruled that "death qualification" violated McCree's right under the Sixth Amendment, as applied to the States via incorporation through the Fourteenth Amendment, see *Duncan* v. *Louisiana*, 391 U. S. 145, 148–158 (1968), to a jury selected from a representative cross section of the community. But we do not believe that the fair-cross-section requirement can, or should, be applied as broadly as that court attempted to apply it. We have never invoked the fair-cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large. See *Duren* v. *Missouri*, 439 U. S. 357, 363–364 (1979); *Taylor* v. *Louisiana*, 419 U. S. 522, 538 (1975) ("[W]e impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population"); cf. *Batson* v. *Kentucky*, *ante*, at 84–85, n. 4 (expressly declining to address "fair-cross-section" challenge to discriminatory use of peremptory challenges).[14] The limited scope of the fair-cross-section requirement is a direct and inevitable consequence of the practical impossibility of providing each criminal defendant with a truly "representative" petit jury, see *ante*, at 85–86, n. 6, a basic truth that the Court of Appeals itself acknowledged for many years prior to its decision in the instant case. See *United States* v. *Childress*, 715 F. 2d 1313 (CA8 1983) (en banc), cert. denied, 464 U. S. 1063 (1984); *Pope* v. *United States*, 372 F. 2d 710, 725 (CA8 1967) (Blackmun, J.) ("The point at which an accused is entitled to a fair cross-section of the community is when the names are put in the box from which the panels are drawn"), vacated on other grounds, 392 U. S. 651 (1968). We remain convinced that an extension of the fair-cross-section requirement to petit juries would be unworkable and unsound, and we decline McCree's invitation to adopt such an extension.

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[14] The only case in which we have intimated that the fair-cross-section requirement might apply outside the context of jury panels or venires, *Ballew* v. *Georgia*, 435 U. S. 223 (1978) (opinion of BLACKMUN, J.), did not involve jury *selection* at all, but rather the *size* of the petit jury. JUSTICE BLACKMUN's opinion announcing the judgment, and the opinions concurring in the judgment which agreed with him, expressed the view that Georgia's limitation of the size of juries to five "prevents juries from truly representing their communities," *id.*, at 239.

But even if we were willing to extend the fair-cross-section requirement to petit juries, we would still reject the Eighth Circuit's conclusion that "death qualification" violates that requirement. The essence of a "fair-cross-section" claim is the systematic exclusion of "a 'distinctive' group in the community." *Duren*, *supra*, at 364. In our view, groups defined solely in terms of shared attitudes that would prevent or substantially impair members of the group from performing one of their duties as jurors, such as the "*Witherspoon*-excludables" at issue here, are not "distinctive groups" for fair-cross-section purposes.

We have never attempted to precisely define the term "distinctive group," and we do not undertake to do so today. But we think it obvious that the concept of "distinctiveness" must be linked to the purposes of the fair-cross-section requirement. In *Taylor*, *supra*, we identified those purposes as (1) "guard[ing] against the exercise of arbitrary power" and ensuring that the "commonsense judgment of the community" will act as "a hedge against the overzealous or mistaken prosecutor," (2) preserving "public confidence in the fairness of the criminal justice system," and (3) implementing our belief that "sharing in the administration of justice is a phase of civic responsibility." *Id.*, at 530–531.

Our prior jury-representativeness cases, whether based on the fair-cross-section component of the Sixth Amendment or the Equal Protection Clause of the Fourteenth Amendment, have involved such groups as blacks, see *Peters* v. *Kiff*, 407 U. S. 493 (1972) (opinion of MARSHALL, J.) (equal protection); women, see *Duren, supra* (fair cross section); *Taylor, supra* (same); and Mexican-Americans, see *Castaneda* v. *Partida*, 430 U. S. 482 (1977) (equal protection). The wholesale exclusion of these large groups from jury service clearly contravened all three of the aforementioned purposes of the fair-cross-section requirement. Because these groups were excluded for reasons completely unrelated to the ability of members of the group to serve as jurors in a particular case, the exclusion raised at least the possibility that the composition of juries would be arbitrarily skewed in such a way as to deny criminal defendants the benefit of the common-sense judgment of the community. In addition, the exclusion from jury service of large groups of individuals not on the basis of their inability to serve as jurors, but on the basis of some immutable characteristic such as race, gender, or ethnic background, undeniably gave rise to an "appearance of unfairness." Finally, such exclusion improperly deprived members of these often historically disadvantaged groups of their right as citizens to serve on juries in criminal cases.

The group of "*Witherspoon*-excludables" involved in the case at bar differs significantly from the groups we have previously recognized as "distinctive." "Death qualification," unlike the wholesale exclusion of blacks, women, or Mexican-Americans from jury service, is carefully designed to serve the State's concededly legitimate interest in obtaining a single jury that can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases of a capital trial.[15] There is very little danger, therefore, and McCree does not even argue, that "death qualification" was instituted as a means for the State to arbitrarily skew the composition of capital-case juries.[16]

Furthermore, unlike blacks, women, and Mexican-Americans, "*Witherspoon*-excludables" are singled out for exclusion in capital cases on the basis of an attribute that is within the individual's control. It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law. Because the group of "*Witherspoon*-excludables" includes only those who cannot and will not conscientiously obey the law with respect to one of the issues in a capital case, "death qualification" hardly can be said to create an "appearance of unfairness."

Finally, the removal for cause of "*Witherspoon*-excludables" in capital cases does not prevent them from serving as jurors in other criminal cases, and thus leads to no substantial deprivation of their basic rights of citizenship. They are treated no differently than any juror who expresses the view that he would be unable to follow the law in a particular case.

In sum, "*Witherspoon*-excludables," or for that matter any other group defined solely in terms of shared attitudes that render members of the group unable to serve as jurors in a particular case, may be excluded from jury service without contravening any of the basic objectives of the fair-cross-section requirement. See *Lockett* v. *Ohio*, 438 U. S. 586, 597 (1978) ("Nothing in *Taylor*, however, suggests that the right to a representative jury includes the right to be tried by jurors who have explicitly indicated an inability to follow the law and instructions of the trial judge"). It is for this reason that we conclude that "*Witherspoon*-excludables" do not constitute a "distinctive group" for fair-cross-section purposes, and hold that "death qualification" does not violate the fair-cross-section requirement.

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[15] See *Rector* v. *State*, 280 Ark. 385, 396–397, 659 S. W. 2d 168, 173–174 (1983), cert. denied, 466 U. S. 988 (1984). McCree does not dispute the existence of this interest, but merely contends that it is not substantial. See Brief for Respondent 74–79.

[16] McCree asserts that the State often will request the death penalty in particular cases solely for the purpose of "death qualifying" the jury, with the intent ultimately to "waive" the death penalty after a conviction is obtained. We need not consider the implications of this assertion, since the State did not "waive" the death penalty in McCree's case.

McCree argues that, even if we reject the Eighth Circuit's fair-cross-section holding, we should affirm the judgment below on the alternative ground, adopted by the District Court, that "death qualification" violated his constitutional right to an impartial jury. McCree concedes that the individual jurors who served at his trial were impartial, as that term was defined by this Court in cases such as *Irvin* v. *Dowd*, 366 U. S. 717, 723 (1961) ("It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court"), and *Reynolds* v. *United States*, 98 U. S. 145 (1879). He does not claim that pretrial publicity, see *Rideau* v. *Louisiana*, 373 U. S. 723 (1963), *ex parte* communications, see *Remmer* v. *United States*, 347 U. S. 227 (1954), or other undue influence, see *Estes* v. *Texas*, 381 U. S. 532 (1965), affected the jury's deliberations. In short, McCree does not claim that his conviction was tainted by any of the kinds of jury bias or partiality that we have previously recognized as violative of the Constitution. Instead, McCree argues that his jury lacked impartiality because the absence of "*Witherspoon*-excludables" "slanted" the jury in favor of conviction.

We do not agree. McCree's "impartiality" argument apparently is based on the theory that, because all individual jurors are to some extent predisposed towards one result or another, a constitutionally impartial *jury* can be constructed only by "balancing" the various predispositions of the individual *jurors*. Thus, according to McCree, when the State "tips the scales" by excluding prospective jurors with a particular viewpoint, an impermissibly partial jury results. We have consistently rejected this view of jury impartiality, including as recently as last Term when we squarely held that an impartial *jury* consists of nothing more than "*jurors* who will conscientiously apply the law and find the facts." *Wainwright* v. *Witt*, 469 U. S. 412, 423 (1985) (emphasis added); see also *Smith* v. *Phillips*, 455 U. S. 209, 217 (1982) ("Due process means a jury capable and willing to decide the case solely on the evidence before it"); *Irvin* v. *Dowd*, *supra*, at 722 ("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors").

The view of jury impartiality urged upon us by McCree is both illogical and hopelessly impractical. McCree characterizes the jury that convicted him as "slanted" by the process of "death qualification." But McCree admits that exactly the same 12 individuals could have ended up on his jury through the "luck of the draw," without in any way violating the constitutional guarantee of impartiality. Even accepting McCree's position that we should focus on the *jury* rather than the individual *jurors*, it is hard for us to understand the logic of the argument that a given jury is unconstitutionally partial when it results from a state-ordained process, yet impartial when exactly the same jury results from mere chance. On a more practical level, if it were true that the Constitution required a certain mix of individual viewpoints on the jury, then trial judges would be required to undertake the Sisyphean task of "balancing" juries, making sure that each contains the proper number of Democrats and Republicans, young persons and old persons, white-collar executives and blue-collar laborers, and so on. Adopting McCree's concept of jury impartiality would also likely require the elimination of peremptory challenges, which are commonly used by both the State and the defendant to attempt to produce a jury favorable to the challenger.

McCree argues, however, that this Court's decisions in *Witherspoon* and *Adams* v. *Texas*, 448 U. S. 38 (1980), stand for the proposition that a State violates the Constitution whenever it "slants" the jury by excluding a group of individuals more likely than the population at large to favor the criminal defendant. We think McCree overlooks two fundamental differences between *Witherspoon* and *Adams* and the instant case, and therefore misconceives the import and scope of those two decisions.

First, the Court in *Witherspoon* viewed the Illinois system as having been deliberately slanted for the purpose of making the imposition of the death penalty more likely. The Court said:

> "But when it swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die.
>
> "It is, of course, settled that a State may not entrust the determination of whether a man is innocent or guilty to a tribunal 'organized to convict.' *Fay* v. *New York*, 332 U. S. 261, 294 [1947]. See *Tumey* v. *Ohio*, 273 U. S. 510 [1927]. It requires but a short step from that principle to hold, as we do today, that a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death." 391 U. S., at 520–521 (footnotes omitted).

In *Adams* v. *Texas, supra,* the Court explained the rationale for *Witherspoon* as follows:

> "In this context, the Court held that a State may not constitutionally execute a death sentence imposed by a jury culled of all those who revealed during *voir dire* exami-

> nation that they had conscientious scruples against or were otherwise opposed to capital punishment. The State was held to have no valid interest in such a broad-based rule of exclusion, since '[a] man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him . . . and can thus obey the oath he takes as a juror.' *Witherspoon* v. *Illinois*, 391 U. S., at 519." 448 U. S., at 43.

Adams, in turn, involved a fairly straightforward application of the *Witherspoon* rule to the Texas capital punishment scheme. See *Adams*, *supra*, at 48 (Texas exclusion statute "focuses the inquiry directly on the prospective juror's beliefs about the death penalty, and hence clearly falls within the scope of the *Witherspoon* doctrine").

Here, on the other hand, the removal for cause of "*Witherspoon*-excludables" serves the State's entirely proper interest in obtaining a single jury that could impartially decide all of the issues in McCree's case. Arkansas by legislative enactment and judicial decision provides for the use of a unitary jury in capital cases. See Ark. Stat. Ann. §41–1301(3) (1977); *Rector* v. *State*, 280 Ark. 385, 395, 659 S. W. 2d 168, 173 (1983), cert. denied, 466 U. S. 988 (1984). We have upheld against constitutional attack the Georgia capital sentencing plan which provided that the same jury must sit in both phases of a bifurcated capital murder trial, *Gregg* v. *Georgia*, 428 U. S. 153, 158, 160, 163 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.), and since then have observed that we are "unwilling to say that there is any one right way for a State to set up its capital sentencing scheme." *Spaziano* v. *Florida*, 468 U. S. 447, 464 (1984).

The Arkansas Supreme Court recently explained the State's legislative choice to require unitary juries in capital cases:

> "It has always been the law in Arkansas, except when the punishment is mandatory, that the same jurors who have the responsibility for determining guilt or inno-

> cence must also shoulder the burden of fixing the punishment. That is as it should be, for the two questions are necessarily interwoven." *Rector, supra,* at 395, 659 S. W. 2d, at 173.

Another interest identified by the State in support of its system of unitary juries is the possibility that, in at least some capital cases, the defendant might benefit at the sentencing phase of the trial from the jury's "residual doubts" about the evidence presented at the guilt phase. The dissenting opinion in the Court of Appeals also adverted to this interest:

> "[A]s several courts have observed, jurors who decide both guilt and penalty are likely to form residual doubts or 'whimsical' doubts . . . about the evidence so as to bend them to decide against the death penalty. Such residual doubt has been recognized as an extremely effective argument for defendants in capital cases. To divide the responsibility . . . to some degree would eliminate the influence of such doubts." 758 F. 2d, at 247–248 (J. Gibson, J., dissenting) (citations omitted).

JUSTICE MARSHALL's dissent points out that some States which adhere to the unitary jury system do not allow the defendant to argue "residual doubts" to the jury at sentencing. But while this may justify skepticism as to the extent to which such States are willing to go to allow defendants to capitalize on "residual doubts," it does not wholly vitiate the claimed interest. Finally, it seems obvious to us that in most, if not all, capital cases much of the evidence adduced at the guilt phase of the trial will also have a bearing on the penalty phase; if two different juries were to be required, such testimony would have to be presented twice, once to each jury. As the Arkansas Supreme Court has noted, "[s]uch repetitive trials could not be consistently fair to the State and perhaps not even to the accused." *Rector, supra,* at 396, 659 S. W. 2d, at 173.

Unlike the Illinois system criticized by the Court in *Witherspoon*, and the Texas system at issue in *Adams*, the Arkansas system excludes from the jury only those who may properly be excluded from the penalty phase of the deliberations under *Witherspoon*, *Adams*, and *Wainwright* v. *Witt*, 469 U. S. 412 (1985).[17] That State's reasons for adhering to its preference for a single jury to decide both the guilt and penalty phases of a capital trial are sufficient to negate the inference which the Court drew in *Witherspoon* concerning the lack of any neutral justification for the Illinois rule on jury challenges.

Second, and more importantly, both *Witherspoon* and *Adams* dealt with the special context of capital sentencing, where the range of jury discretion necessarily gave rise to far greater concern over the possible effects of an "imbalanced" jury. As we emphasized in *Witherspoon:*

> "[I]n Illinois, as in other States, the jury is given broad discretion to decide whether or not death *is* 'the proper penalty' in a given case, and a juror's general views about capital punishment play an inevitable role in any such decision.
>
> ". . . . Guided by neither rule nor standard, 'free to select or reject as it [sees] fit,' a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death." 391 U. S., at 519 (emphasis in original; footnotes omitted).

Because capital sentencing under the Illinois statute involved such an exercise of essentially unfettered discretion, we held that the State violated the Constitution when it "crossed the line of neutrality" and "produced a jury uncommonly willing to condemn a man to die." *Id.*, at 520–521.

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[17] The rule applied by Arkansas to exclude these prospective jurors was scarcely a novel one; as long ago as *Logan* v. *United States*, 144 U. S. 263 (1892), this Court approved such a practice in the federal courts, commenting that it was also followed "by the courts of every State in which the question has arisen." *Id.*, at 298.

In *Adams*, we applied the same basic reasoning to the Texas capital sentencing scheme, which, although purporting to limit the jury's role to answering several "factual" questions, in reality vested the jury with considerable discretion over the punishment to be imposed on the defendant. See 448 U. S., at 46 ("This process is not an exact science, and the jurors under the Texas bifurcated procedure unavoidably exercise a range of judgment and discretion while remaining true to their instructions and their oaths"); cf. *Jurek* v. *Texas*, 428 U. S. 262, 273 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.) ("Texas law essentially requires that . . . in considering whether to impose a death sentence the jury may be asked to consider whatever evidence of mitigating circumstances the defense can bring before it"). Again, as in *Witherspoon*, the discretionary nature of the jury's task led us to conclude that the State could not "exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty." *Adams*, 448 U. S., at 50.

In the case at bar, by contrast, we deal not with capital sentencing, but with the jury's more traditional role of finding the facts and determining the guilt or innocence of a criminal defendant, where jury discretion is more channeled. We reject McCree's suggestion that *Witherspoon* and *Adams* have broad applicability outside the special context of capital sentencing,[18] and conclude that those two decisions do not support the result reached by the Eighth Circuit here.

In our view, it is simply not possible to define jury impartiality, for constitutional purposes, by reference to some hypothetical mix of individual viewpoints. Prospective jurors come from many different backgrounds, and have many different attitudes and predispositions. But the Constitution presupposes that a jury selected from a fair cross section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case. We hold that McCree's jury satisfied both aspects of this constitutional standard. The judgment of the Court of Appeals is therefore

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[18] The majority in *Adams* rejected the dissent's claim that there was "no plausible distinction between the role of the jury in the guilt/innocence phase of the trial and its role, as defined by the State of Texas, in the sentencing phase." 448 U. S., at 54 (REHNQUIST, J., dissenting).

Reversed.

JUSTICE BLACKMUN concurs in the result.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE STEVENS join, dissenting.

Eighteen years ago, this Court vacated the sentence of a defendant from whose jury the State had excluded all venirepersons expressing any scruples against capital punishment. Such a practice, the Court held, violated the Constitution by creating a "tribunal organized to return a verdict of death." *Witherspoon* v. *Illinois*, 391 U. S. 510, 521 (1968). The only venirepersons who could be constitutionally excluded from service in capital cases were those who "made unmistakably clear . . . that they would *automatically* vote against the imposition of capital punishment" or that they could not assess the defendant's guilt impartially. *Id.*, at 522–523, n. 21.

Respondent contends here that the "death-qualified" jury that convicted him, from which the State, as authorized by *Witherspoon*, had excluded all venirepersons unwilling to consider imposing the death penalty, was in effect "organized to return a verdict" of guilty. In support of this claim, he has presented overwhelming evidence that death-qualified juries are substantially more likely to convict or to convict on more serious charges than juries on which unalterable opponents of capital punishment are permitted to serve. Respondent does not challenge the application of *Witherspoon* to the jury in the sentencing stage of bifurcated capital cases. Neither does he demand that individuals unable to assess culpability impartially ("nullifiers") be permitted to sit on capital juries. All he asks is the chance to have his guilt or innocence determined by a jury like those that sit in noncapital cases—one whose composition has not been tilted in favor of the prosecution by the exclusion of a group of prospective jurors uncommonly aware of an accused's constitutional rights but quite capable of determining his culpability without favor or bias.

With a glib nonchalance ill suited to the gravity of the issue presented and the power of respondent's claims, the Court upholds a practice that allows the State a special advantage in those prosecutions where the charges are the most serious and the possible punishments, the most severe. The State's mere announcement that it intends to seek the death penalty if the defendant is found guilty of a capital offense will, under today's decision, give the prosecution license to empanel a jury especially likely to return that very verdict. Because I believe that such a blatant disregard for the rights of a capital defendant offends logic, fairness, and the Constitution, I dissent.

I

Respondent is not the first to argue that "death qualification" poses a substantial threat to the ability of a capital defendant to receive a fair trial on the issue of his guilt or innocence. In 1961, one scholar observed that "Jurors hesitant to levy the death penalty would . . . seem more prone to resolve the many doubts as to guilt or innocence in the defendant's favor than would jurors qualified on the 'pound of flesh' approach." Oberer, Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?, 39 Texas L. Rev. 545, 549 (1961).

When he claimed that the exclusion of scrupled jurors from his venire had violated his constitutional right to an impartial jury, the petitioner in *Witherspoon* v. *Illinois*, *supra*, sought to provide empirical evidence to corroborate Oberer's intuition. See Brief for Petitioner in *Witherspoon* v. *Illinois*, O. T. 1967, No. 1015, pp. 28–33. The data on this issue, however, consisted of only three studies and one preliminary summary of a study.[1] Although the data certainly supported the validity of Witherspoon's challenge to his conviction, these studies did not provide the Court with the firmest basis for constitutional adjudication. As a result, while it reversed Witherspoon's death sentence, the Court was unable to conclude that "the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction," 391 U. S., at 518, and declined to reverse Witherspoon's conviction. Nonetheless, the Court was careful to note:

> "[A] defendant convicted by [a properly death-qualified] jury in some future case might still attempt to establish that the jury was less than neutral with respect to *guilt*. If he were to succeed in that effort, the question would then arise whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence—given the possibility of accommodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment. That problem is not presented here, however, and we intimate no view as to its proper resolution." *Id.*, at 520, n. 18.

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[1] The *Witherspoon* Court had before it only a preliminary summary of the results of H. Zeisel, Some Data on Juror Attitudes Towards Capital Punishment (University of Chicago Monograph 1968), "not the data nor the analysis that underlay his conclusions, nor indeed his final conclusions themselves." *Hovey* v. *Superior Court*, 28 Cal. 3d 1, 30, n. 63, 616 P. 2d 1301, 1317, n. 63 (1980).

In the wake of *Witherspoon*, a number of researchers set out to supplement the data that the Court had found inadequate in that case. The results of these studies were exhaustively analyzed by the District Court in this case, see *Grigsby* v. *Mabry*, 569 F. Supp. 1273, 1291–1308 (ED Ark. 1983) *(Grigsby II)*, and can be only briefly summarized here.[2] The data strongly suggest that death qualification excludes a significantly large subset—at least 11% to 17%—of potential jurors who could be impartial during the guilt phase of trial.[3] Among the members of this excludable class are a disproportionate number of blacks and women. See *id.*, at 1283, 1293–1294.

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[2] Most of the studies presented here were also comprehensively summarized in *Hovey* v. *Superior Court*, *supra*. Because the California Supreme Court found the studies had not accounted for jurors who could be excluded because they would automatically vote for the death penalty where possible, that court ultimately rejected a defendant's constitutional challenge to death qualification. But see Kadane, After *Hovey*: A Note on Taking Account of the Automatic Death Penalty Jurors, 8 Law & Hum. Behav. 115 (1984).

[3] Bronson, On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen, 12 U. Colo. L. Rev. 1 (1970) (using classification only approximating *Witherspoon* standard, and finding 11% of subjects *Witherspoon*-excludable); Bronson, Does the Exclusion of Scrupled Jurors in Capital Cases Make the Jury More Likely to Convict? Some Evidence from California, 3 Woodrow Wilson L. J. 11 (1980) (using more appropriate *Witherspoon* question and finding 93% overlap of "strongly opposed" group in prior Bronson study with *Witherspoon*-excludables); Jurow, New Data on the Effect of a "Death Qualified Jury" on the Guilt Determination Process, 84 Harv. L. Rev. 567 (1971) (finding only 10% of sample excludable, but likely to have underestimated size of class in general population because sample 99% white and 80% male); Fitzgerald & Ellsworth, Due Process vs. Crime Control: Death Qualification and Jury Attitudes, 8 Law & Hum. Behav. 31 (1984) (random sample with nullifiers screened out finding 17% still excludable under *Witherspoon*); A. Young, Arkansas Archival Study (unpublished, 1981) (14% of jurors questioned in *voir dire* transcripts excludable); Precision Research, Inc., Survey No. 1286 (1981) (11% excludable, not counting nullifiers); see 569 F. Supp., at 1285; *Grigsby* v. *Mabry*, 758 F. 2d 226, 231 (CA8 1985).

The perspectives on the criminal justice system of jurors who survive death qualification are systematically different from those of the excluded jurors. Death-qualified jurors are, for example, more likely to believe that a defendant's failure to testify is indicative of his guilt, more hostile to the insanity defense, more mistrustful of defense attorneys, and less concerned about the danger of erroneous convictions. *Id.*, at 1283, 1293, 1304. This proprosecution bias is reflected in the greater readiness of death-qualified jurors to convict or to convict on more serious charges. *Id.*, at 1294–1302; *Grigsby* v. *Mabry*, 758 F. 2d 226, 233–236 (CA8 1985). And, finally, the very process of death qualification—which focuses attention on the death penalty before the trial has even begun—has been found to predispose the jurors that survive it to believe that the defendant is guilty. 569 F. Supp., at 1302–1305; 758 F. 2d, at 234.

The evidence thus confirms, and is itself corroborated by, the more intuitive judgments of scholars and of so many of the participants in capital trials—judges, defense attorneys, and prosecutors. See 569 F. Supp., at 1322.[4]

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[4] The Court reasons that because the State did not "waive" the death penalty in respondent's case, we "need not consider the implications" of respondent's assertion that "the State often will request the death penalty in particular cases solely for the purpose of 'death qualifying' the jury, with the intent ultimately to 'waive' the death penalty after a conviction is obtained." *Ante*, at 176, n. 16. If, by this, the Court intended to limit the effects of its decision to the case pending before us, I would gladly join that effort. However, I see all too few indications in the Court's opinion that future constitutional challenges to death-qualified juries stand much chance of success here. In view of the sweep of the Court's opinion and the fact that, in any particular case, a defendant will never be able to demonstrate with any certainty that the prosecution's decision to seek the death penalty was merely a tactical ruse, I find the Court's refusal to consider the potential for this abuse rather disingenuous. See *Grigsby* v. *Mabry*, 483 F. Supp. 1372, 1389, n. 24 (ED Ark. 1980) *(Grigsby I)* (suggesting possibility that prosecutor had initially sought death penalty merely to get more conviction-prone, death-qualified jury). Cf. Oberer, Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of

II

A

Respondent's case would of course be even stronger were he able to produce data showing the prejudical effects of death qualification upon actual trials. Yet, until a State permits two separate juries to deliberate on the same capital case and return simultaneous verdicts, defendants claiming prejudice from death qualification should not be denied recourse to the only available means of proving their case, recreations of the *voir dire* and trial processes. See *Grigsby* v. *Mabry*, *supra*, at 237 ("[I]t is the courts who have often stood in the way of surveys involving real jurors and we should not now reject a study because of this deficiency").

The chief strength of respondent's evidence lies in the essential unanimity of the results obtained by researchers using diverse subjects and varied methodologies. Even the Court's haphazard jabs cannot obscure the power of the array. Where studies have identified and corrected apparent flaws in prior investigations, the results of the subsequent work have only corroborated the conclusions drawn in the earlier efforts. Thus, for example, some studies might be faulted for failing to distinguish within the class of *Witherspoon*-excludables, between nullifiers (whom respondent concedes may be excluded from the guilt phase) and those who could assess guilt impartially. Yet their results are entirely consistent with those obtained after nullifiers had indeed been excluded. See, *e. g.*, Cowan, Thompson, & Ellsworth, The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation, 8 Law & Hum. Behav. 53 (1984). And despite the failure of certain studies to "allow for group deliberations," *ante*, at

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Fair Trial on Issue of Guilt?, 39 Texas L. Rev. 545, 555, n. 45b (1961) (reporting testimony of one prosecutor that there might be other prosecutors who death-qualified a jury "without hope of obtaining a death verdict but in the expectation that a jury so selected would impose a higher penalty than might otherwise be obtained").

171, n. 10, the value of their results is underscored by the discovery that initial verdict preferences, made prior to group deliberations, are a fair predictor of how a juror will vote when faced with opposition in the jury room. See Cowan, Thompson, & Ellsworth, *supra*, at 68–69; see also R. Hastie, S. Penrod, & N. Pennington, Inside the Jury 66 (1983); H. Kalven & H. Zeisel, The American Jury 488 (1966).

The evidence adduced by respondent is quite different from the "tentative and fragmentary" presentation that failed to move this Court in *Witherspoon*. 391 U. S., at 517. Moreover, in contrast to *Witherspoon*, the record in this case shows respondent's case to have been "subjected to the traditional testing mechanisms of the adversary process," *Ballew* v. *Georgia* 435 U. S. 223, 246 (1978) (POWELL, J., concurring in judgment). At trial, respondent presented three expert witnesses and one lay witness in his case in chief, and two additional lay witnesses in his rebuttal. Testimony by these witnesses permitted the District Court, and allows this Court, better to understand the methodologies used here and their limitations. Further testing of respondent's empirical case came at the hands of the State's own expert witnesses. Yet even after considering the evidence adduced by the State, the Court of Appeals properly noted: "there are no studies which contradict the studies submitted [by respondent]; in other words, all of the documented studies support the district court's findings." 758 F. 2d, at 238.

B

The true impact of death qualification on the fairness of a trial is likely even more devastating than the studies show. *Witherspoon* placed limits on the State's ability to strike scrupled jurors for cause, unless they state "unambiguously that [they] would automatically vote against the imposition of capital punishment no matter what the trial might reveal," 391 U. S., at 516, n. 9. It said nothing, however, about the prosecution's use of peremptory challenges to eliminate jurors who do not meet that standard and would otherwise survive death qualification. See Gillers, Deciding Who Dies, 129 U. Pa. L. Rev. 1, 85, n. 391 (1980). There is no question that peremptories have indeed been used to this end, thereby expanding the class of scrupled jurors excluded as a result of the death-qualifying *voir dire* challenged here. See, *e. g.*, *People* v. *Velasquez*, 26 Cal. 3d 425, 438, n. 9, 606 P. 2d 341, 348, n. 9 (1980) (prosecutor informed court during *voir dire* that if a venireperson expressing scruples about the death penalty "were not a challenge for cause, I would kick her off on a peremptory challenge"). The only study of this practice has concluded: "For the five-year period studied a prima facie case has been demonstrated that prosecutors in Florida's Fourth Judicial Circuit systematically used their peremptory challenges to eliminate from capital juries venirepersons expressing opposition to the death penalty." Winick, Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis, 81 Mich. L. Rev. 1, 39 (1982).[5]

Judicial applications of the *Witherspoon* standard have also expanded the class of jurors excludable for cause. While the studies produced by respondent generally classified a subject as a *Witherspoon*-excludable only upon his unambiguous refusal to vote death under any circumstance, the courts have never been so fastidious. Trial and appellate courts have frequently excluded jurors even in the absence of unambiguous expressions of their absolute opposition to capital punishment. Schnapper, Taking *Witherspoon* Seriously: The Search for Death-Qualified Jurors, 62 Texas L. Rev. 977,

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[5] At this point, the remedy called for is not the wholesale removal of the prosecution's power to make peremptory challenges, but merely the elimination of death qualification. But cf. *Batson* v. *Kentucky*, *ante*, p. 102 (MARSHALL, J., concurring). Without the extensive *voir dire* now allowed for death qualification, the prosecution would lack sufficient information to be able to expand the scope of *Witherspoon* through the use of peremptories. See n. 8, *infra*.

993–1032 (1984). And this less demanding approach will surely become more common in the wake of this Court's decision in *Wainwright* v. *Witt*, 469 U. S. 412 (1985). Under *Witt*, a juror who does not make his attitude toward capital punishment "unmistakably clear," *Witherspoon*, 391 U. S., at 522, n. 21, may nonetheless be excluded for cause if the trial court is left with the impression that his attitude will "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Witt*, *supra*, at 433 (quoting *Adams* v. *Texas*, 448 U. S. 38, 45 (1980)). It thus "seems likely that *Witt* will lead to more conviction-prone panels" since "'scrupled' jurors—those who generally oppose the death penalty but do not express an unequivocal refusal to impose it—usually share the pro-defendant perspective of excludable jurors." See Finch & Ferraro, The Empirical Challenge to Death Qualified Juries: On Further Examination, 65 Neb. L. Rev. 21, 63 (1986).

C

Faced with the near unanimity of authority supporting respondent's claim that death qualification gives the prosecution a particular advantage in the guilt phase of capital trials, the majority here makes but a weak effort to contest that proposition. Instead, it merely assumes for the purposes of this opinion "that 'death qualification' in fact produces juries somewhat more 'conviction-prone' than 'non-death-qualified' juries," *ante*, at 173, and then holds that this result does not offend the Constitution. This disregard for the clear import of the evidence tragically misconstrues the settled constitutional principles that guarantee a defendant the right to a fair trial and an impartial jury whose composition is not biased toward the prosecution.

III

In *Witherspoon* the Court observed that a defendant convicted by a jury from which those unalterably opposed to the death penalty had been excluded "might still attempt to establish that the jury was less than neutral with respect to *guilt.*" 391 U. S., at 520, n. 18. Respondent has done just that. And I believe he has succeeded in proving that his trial by a jury so constituted violated his right to an impartial jury, guaranteed by both the Sixth Amendment and principles of due process, see *Ristaino* v. *Ross*, 424 U. S. 589, 595, n. 6 (1976). We therefore need not rely on respondent's alternative argument that death qualification deprived him of a jury representing a fair cross section of the community.[6]

A

Respondent does not claim that any individual on the jury that convicted him fell short of the constitutional standard for impartiality. Rather, he contends that, by systematically excluding a class of potential jurors less prone than the population at large to vote for conviction, the State gave itself an unconstitutional advantage at his trial. Thus, according to respondent, even though a nonbiased selection procedure might have left him with a jury composed of the very same individuals that actually sat on his panel, the process by which those 12 individuals were chosen violated the Constitution.

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[6] With respect to the Court's discussion of respondent's fair-cross-section claim, however, I must note that there is no basis in either precedent or logic for the suggestion that a state law authorizing the prosecution before trial to exclude from jury service all, or even a substantial portion of, the members of a "distinctive group" would not constitute a clear infringement of a defendant's Sixth Amendment right. "The desired interaction of a cross section of the community does not take place within the venire; it is only effectuated by the jury that is selected and sworn to try the issues." *McCray* v. *New York*, 461 U. S. 961, 968 (1983) (MARSHALL, J., dissenting from denial of certiorari); see *McCray* v. *Abrams*, 750 F. 2d 1113, 1128–1129 (CA2 1984), cert. pending, No. 84–1426. The right to have a particular group represented on venires is of absolutely no value if every member of that group will automatically be excluded from service as soon as he is found to be a member of that group. Whether a violation of the fair-cross-section requirement has occurred can hardly turn on *when* the wholesale exclusion of a group takes place. If, for example, blacks were systematically struck from petit juries pursuant to state law, the effect—and the infringement of a defendant's Sixth Amendment rights—would be the same as if they had never been included on venires in the first place.

I am puzzled by the difficulty that the majority has in understanding the "logic of the argument." *Ante*, at 178. For the logic is precisely that which carried the day in *Witherspoon*, and which has never been repudiated by this Court—not even today, if the majority is to be taken at its word. There was no question in *Witherspoon* that if the defendant's jury had been chosen by the "luck of the draw," the same 12 jurors who actually sat on his case might have been selected. Nonetheless, because the State had removed from the pool of possible jurors all those expressing general opposition to the death penalty, the Court overturned the defendant's conviction, declaring "that a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death." 391 U. S., at 521. Witherspoon had been denied a fair sentencing determination, the Court reasoned, not because any member of his jury lacked the requisite constitutional impartiality, but because the manner in which that jury had been selected "stacked the deck" against him. *Id.*, at 523. Here, respondent adopts the approach of the *Witherspoon* Court and argues simply that the State entrusted the determination of his guilt and the level of his culpability to a tribunal organized to convict.

The Court offers but two arguments to rebut respondent's constitutional claim. First, it asserts that the "State's reasons for adhering to its preference for a single jury to decide both the guilt and penalty phases of a capital trial are sufficient to negate the inference which the Court drew in *Witherspoon* concerning the lack of any neutral justification for the Illinois rule on jury challenges." *Ante*, at 182. This argument, however, does not address the question whether death qualification infringes a defendant's constitutional interest in "a completely fair determination of guilt or innocence," *Witherspoon*, 391 U. S., at 520, n. 18. It merely indicates the state interest that must be considered once an infringement of that constitutional interest is found.

The Court's second reason for rejecting respondent's challenge to the process that produced his jury is that the notion of "neutrality" adumbrated in *Witherspoon* must be confined to "the special context of capital sentencing, where the range of jury discretion necessarily gave rise to far greater concern over the possible effects of an 'imbalanced' jury." *Ante*, at 182. But in the wake of this Court's decision in *Adams* v. *Texas*, 448 U. S. 38 (1980), this distinction is simply untenable.

B

In *Adams*, this Court applied the principles of *Witherspoon* to the Texas death-penalty scheme. Under that scheme, if a defendant is convicted of a capital offense, a separate sentencing proceeding is held at which additional aggravating or mitigating evidence is admissible. The jury then must answer three questions based on evidence adduced during either phase of the trial:

> "(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> "(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> "(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in reponse to the provocation, if any, by the deceased." Tex. Code Crim. Proc. Ann., Art. 37.071(b) (Vernon Supp. 1986).

See *Adams*, *supra*, at 40–41. If the jury finds beyond a reasonable doubt that the answer to each of these questions is "yes," the court must impose a death sentence; a single "no" answer requires the court to impose a sentence of life imprisonment. With the role of the jury so defined, *Adams* held that Texas could not constitutionally exclude every prospective juror unable to state under oath that "the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact." Tex. Penal Code Ann. § 12.31(b) (1974); see *Adams*, *supra*, at 42. The "process" of answering the statutory questions, the Court observed, "is not an exact science, and the jurors under the Texas bifurcated procedure unavoidably exercise a range of judgment and discretion while remaining true to their instructions and their oaths." 448 U. S., at 46. Consequently, while Texas could constitutionally exclude jurors whose scruples against the death penalty left them unable "to answer the statutory questions without conscious distortion or bias," *ibid.*, it could not exclude those

> "[who] aver that they will honestly find the facts and answer the questions in the affirmative if they are convinced beyond reasonable doubt, but not otherwise, yet who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt. Such assessments and judgments by jurors are inherent in the jury system, and to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law." *Id.*, at 50.

The message of *Adams* is thus that even where the role of the jury at the penalty stage of a capital trial is limited to what is essentially a factfinding role, the right to an impartial jury established in *Witherspoon* bars the State from skewing the composition of its capital juries by excluding scrupled jurors who are nonetheless able to find those facts without distortion or bias. This proposition cannot be limited to the penalty stage of a capital trial, for the services that Adams' jury was called upon to perform at his penalty stage "are nearly indistinguishable" from those required of juries at the culpability phase of capital trials. Gillers, Proving the Prejudice of Death-Qualified Juries after *Adams v. Texas*, 47 U. Pitt. L. Rev. 219, 247 (1985). Indeed, JUSTICE REHNQUIST noted in *Adams* that he could "see no plausible distinction between the role of the jury in the guilt/innocence phase of the trial and its role, as defined by the State of Texas, in the sentencing phase." 448 U. S., at 54 (dissenting). Contrary to the majority's suggestion, *ante* at 183, this point was at no time repudiated by the *Adams* Court. And the absence of a reply to JUSTICE REHNQUIST was not an oversight. At the penalty stage of his trial, Adams' jury may have been called upon to do something more than ascertain the existence *vel non* of specific historical facts. Yet the role assigned a jury at a trial's culpability phase is little different, for there the critical task of the jury will frequently be to determine not whether defendant actually inflicted the fatal wound, but rather whether his level of culpability at the time of the murder makes conviction on capital murder charges, as opposed to a lesser count, more appropriate. Representing the conscience of the community, the jurors at both stages "unavoidably exercise a range of judgment and discretion while remaining true to their instructions and their oaths." 448 U. S., at 46.

Adams thus provides clear precedent for applying the analysis of *Witherspoon* to the guilt phase of a criminal trial. Indeed, respondent's case is even stronger than Witherspoon's. The Court in *Witherspoon* merely presumed that the exclusion of scrupled jurors would unacceptably increase the likelihood that the defendant would be condemned to death. Respondent here has gone much further and laid a solid empirical basis to support his claim that the juries produced by death qualification are substantially more likely to convict.

IV

A

One need not rely on the analysis and assumptions of *Adams* and *Witherspoon* to demonstrate that the exclusion of opponents of capital punishment capable of impartially determining culpability infringes a capital defendant's constitutional right to a fair and impartial jury. For the same conclusion is compelled by the analysis that in *Ballew* v. *Georgia*, 435 U. S. 223 (1978), led a majority of this Court[7] to hold that a criminal conviction rendered by a five-person jury violates the Sixth and Fourteenth Amendments.

Faced with an effort by Georgia to reduce the size of the jury in a criminal case beyond the six-member jury approved by this Court in *Williams* v. *Florida*, 399 U. S. 78 (1970), this Court articulated several facets of the inquiry whether the reduction impermissibly "inhibit[ed] the functioning of the jury as an institution to a significant degree." *Ballew*, *supra*, at 231. First, the Court noted that "recent empirical data" had suggested that a five-member jury was "less likely to foster effective group deliberation" and that such a decline in effectiveness would likely lead "to inaccurate factfinding and incorrect application of the common sense of the community to the facts." *Id.*, at 232. The Court advanced several explanations for this phenomenon:

> "As juries decrease in size . . . , they are less likely to have members who remember each of the important pieces of evidence or argument. Furthermore, the smaller the group, the less likely it is to overcome the biases of its members to obtain an accurate result. When individual and group decisionmaking were com-

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[7] Although the opinion of JUSTICE BLACKMUN in *Ballew* was cosigned by only JUSTICE STEVENS, three other Justices specifically joined that opinion "insofar as it holds that the Sixth and Fourteenth Amendments require juries in criminal trials to contain more than five persons." 435 U. S., at 246 (opinion of BRENNAN, J., joined by Stewart and MARSHALL, JJ.).

> pared, it was seen that groups performed better because prejudices of individuals were frequently counterbalanced, and objectivity resulted." *Id.*, at 233 (footnotes omitted).

The Court also cited empirical evidence suggesting "that the verdicts of jury deliberation in criminal cases will vary as juries become smaller, and that the variance amounts to an imbalance to the detriment of one side, the defense." *Id.*, at 236. Lastly, the Court observed that further reductions in jury size would also foretell problems "for the representation of minority groups in the community." *Ibid.*

B

Each of the concerns that led this Court in *Ballew* to find that a misdemeanor defendant had been deprived of his constitutional right to a fair trial by jury is implicated by the process of death qualification, which threatens a defendant's interests to an even greater extent in cases where the stakes are substantially higher. When compared to the juries that sit in all other criminal trials, the death-qualified juries of capital cases are likely to be deficient in the quality of their deliberations, the accuracy of their results, the degree to which they are prone to favor the prosecution, and the extent to which they adequately represent minority groups in the community.

The data considered here, as well as plain common sense, leave little doubt that death qualification upsets the "counterbalancing of various biases" among jurors that *Ballew* identified as being so critical to the effective functioning of juries. *Id.*, at 234. The evidence demonstrates that "a person's attitude toward capital punishment is an important indicator of a whole cluster of attitudes about crime control and due process." Fitzgerald & Ellsworth, Due Process vs. Crime Control: Death Qualification and Jury Attitudes, 8 Law & Hum. Behav. 31, 46 (1984). Members of the excluded group have been shown to be significantly more concerned with the constitutional rights of criminal defendants and more likely to doubt the strength of the prosecution's case. No doubt because diversity promotes controversy, which in turn leads to a closer scrutiny of the evidence, one study found that "the members of mixed juries [composed of *Witherspoon*-excludables as well as death-qualified jurors] remember the evidence better than the members of death-qualified juries." Cowan, Thompson, & Ellsworth, 8 Law & Hum. Behav., at 76. This study found that not only is the recall of evidence by a death-qualified jury likely to be below the standard of ordinary juries, but its testing of that evidence will be less rigorous. *Id.*, at 75. It thus appears that in the most serious criminal cases—those in which the State has expressed an intention to seek the death penalty—the ability of the jury to find historical truth may well be impaired.

The role of a jury in criminal cases, however, is not limited to the determination of historical facts. The task of ascertaining the level of a defendant's culpability requires a jury to decide not only whether the accused committed the acts alleged in the indictment, but also the extent to which he is morally blameworthy. Thus, especially in capital cases, where a defendant invariably will be charged with lesser included offenses having factual predicates similar to those of the capital murder charges, see *Beck* v. *Alabama* 447 U. S. 625 (1980), it may be difficult to classify a particular verdict as "accurate" or "inaccurate." However, the *Ballew* Court went beyond a concern for simple historical accuracy and questioned any jury procedure that systematically operated to the "detriment of . . . the defense." 435 U. S., at 236.

With even more clarity than the data considered in *Ballew*, the studies adduced by respondent show a broad pattern of "biased decisionmaking," *Ballew*, *supra*, at 239. It is not merely that the jurors who survive death qualification are more likely to accept the word of the prosecution and be satisfied with a lower standard of proof than those who are excluded. The death-qualified jurors are actually more likely to convict than their peers. Whether the verdict against a particular capital defendant will actually be different depends on the strength of the evidence against him, the likelihood that, absent death qualification, one or more *Witherspoon*-excludables would have sat on his jury, and a host of other factors. See Gillers, 47 U. Pitt. L. Rev., at 232–238. However, *Ballew* points to the importance of considering the effects of a particular jury procedure over a range of cases, and not focusing on the fairness of any single trial. Because it takes only one juror unwilling to find that the prosecution has met its burden for a trial to end in either a mistrial or a compromise verdict, "it can be confidently asserted that, over time, some persons accused of capital crimes will be convicted of offenses—and to a higher degree—who would not be so convicted" had all persons able to assess their guilt impartially been permitted to sit on their juries. *Hovey* v. *Superior Court*, 28 Cal. 3d 1, 25, n. 57, 616 P. 2d 1301, 1314, n. 57 (1980).

Death qualification also implicates the *Ballew* Court's concern for adequate representation of minority groups. Because opposition to capital punishment is significantly more prevalent among blacks than among whites, the evidence suggests that death qualification will disproportionately affect the representation of blacks on capital juries. Though perhaps this effect may not be sufficient to constitute a violation of the Sixth Amendment's fair-cross-section principle, see *Duren* v. *Missouri*, 439 U. S. 357, 363–364 (1979), it is similar in magnitude to the reduction in minority representation that the *Ballew* Court found to be of "constitutional significance" to a defendant's right to a fair jury trial, 435 U. S., at 239. See White, Death-Qualified Juries: The "Prosecution Proneness" Argument Reexamined, 41 U. Pitt. L. Rev. 353, 387–389 (1980).

The principle of "impartiality" invoked in *Witherspoon* is thus not the only basis for assessing whether the exclusion of jurors unwilling to consider the death penalty but able impartially to determine guilt infringes a capital defendant's constitutional interest in a fair trial. By identifying the critical concerns that are subsumed in that interest, the *Ballew* Court pointed to an alternative approach to the issue, drawing on the very sort of empirical data that respondent has presented here. And viewed in light of the concerns articulated in *Ballew*, the evidence is sufficient to establish that death qualification constitutes a substantial threat to a defendant's Sixth and Fourteenth Amendment right to a fair jury trial—a threat constitutionally acceptable only if justified by a sufficient state interest.

C

Respondent's challenge to the impartiality of death-qualified juries focuses upon the imbalance created when jurors particularly likely to look askance at the prosecution's case are systematically excluded from panels. He therefore appears to limit his constitutional claim to only those cases in which jurors have actually been struck for cause because of their opposition to the death penalty. Tr. of Oral Arg. 26. However, this limitation should not blind the Court to prejudice that occurs even in cases in which no juror has in fact been excluded for refusing to consider the death penalty.

There is considerable evidence that the very process of determining whether any potential jurors are excludable for cause under *Witherspoon* predisposes jurors to convict. One study found that exposure to the *voir dire* needed for death qualification "increased subjects' belief in the guilt of the defendant and their estimate that he would be convicted." Haney, On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process, 8 Law & Hum. Behav. 121, 128 (1984). See *Hovey, supra,* at 73, 616 P. 2d, at 1349. Even if this prejudice to the accused does not constitute an independent due process violation, it surely should be taken into account in any inquiry into the effects of death qualification. "[T]he process effect may function additively to worsen the perspective of an already conviction-prone jury whose composition has been distorted by the outcome of this selection process . . . ." Haney, Examining Death Qualification: Further Analysis of the Process Effect, 8 Law & Hum. Behav. 133, 151 (1984).

The majority contends that any prejudice attributed to the process of death-qualifying jurors is justified by the State's interest in identifying and excluding nullifiers before the guilt stage of trial. *Ante*, at 170, n. 7. It overlooks, however, the ease with which nullifiers could be identified before trial without any extended focus on how jurors would conduct themselves at a capital sentencing proceeding. Potential jurors could be asked, for example, "if there be any reason why any of them could not fairly and impartially try the issue of defendant's guilt in accordance with the evidence presented at the trial and the court's instructions as to the law." *Grigsby II*, 569 F. Supp., at 1310.[8] The prejudice attributable to the current pretrial focus on the death penalty should therefore be considered here and provides but another reason for concluding that death qualification infringes a capital defendant's "interest in a completely fair determination of guilt or innocence." *Witherspoon*, 391 U. S., at 520, n. 18.

V

As the *Witherspoon* Court recognized, "the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment" may be accommodated without infringing a capital defendant's interest in a fair determination of his guilt if the State uses "one jury to decide guilt and another to fix punishment." *Ibid.* Any exclusion of death-penalty opponents, the Court reasoned, could await the penalty phase of a trial. The question here is thus whether the State has *other* interests that require the use of a single jury and demand the subordination of a capital defendant's Sixth and Fourteenth Amendment rights.

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[8] Restriction of *voir dire* to this inquiry would limit the ability of the prosecution to use its peremptory challenges to strike those jurors who would have been excluded for cause under the current system of death qualification. And the power of this inquiry to root out *all* prejudices and biases, no matter how great a threat they pose to the fairness of a guilt determination, has only recently been established by this Court as a matter of law. See *Turner* v. *Murray*, *ante*, p. 28. But see *ante*, at 45 (MARSHALL, J., concurring in judgment in part and dissenting in part).

The only two reasons that the Court invokes to justify the State's use of a single jury are efficient trial management and concern that a defendant at his sentencing proceedings may be able to profit from "residual doubts" troubling jurors who have sat through the guilt phase of his trial. The first of these purported justifications is merely unconvincing. The second is offensive.

In *Ballew*, the Court found that the State's interest in saving "court time and . . . financial costs" was insufficient to justify further reductions in jury size. 435 U. S., at 243–244. The same is true here. The additional costs that would be imposed by a system of separate juries are not particularly high.

> "First, capital cases constitute a relatively small number of criminal trials. Moreover, the number of these cases in which a penalty determination will be necessary is even smaller. A penalty determination will occur only where a verdict on guilt has been returned that authorizes the possible imposition of capital punishment, and only where the prosecutor decides that a death sentence should be sought. Even in cases in which a penalty determination will occur, the impaneling of a new penalty jury may not always be necessary. In some cases, it may be possible to have alternate jurors replace any 'automatic life imprisonment' jurors who served at the guilt determination trial." Winick, 81 Mich. L. Rev., at 57.

In a system using separate juries for guilt and penalty phases, time and resources would be saved every time a capital case did not require a penalty phase. The *voir dire* needed to identify nullifiers before the guilt phase is less extensive than the questioning that under the current scheme is conducted before *every* capital trial. The State could, of course, choose to empanel a death-qualified jury at the start of every trial, to be used only if a penalty stage is required. However, if it opted for the cheaper alternative of empaneling a death-qualified jury only in the event that a defendant were convicted of capital charges, the State frequently would be able to avoid retrying the entire guilt phase for the benefit of the penalty jury. Stipulated summaries of prior evidence might, for example, save considerable time. Thus, it cannot fairly be said that the costs of accommodating a defendant's constitutional rights under these circumstances are prohibitive, or even significant.

Even less convincing is the Court's concern that a defendant be able to appeal at sentencing to the "residual doubts" of the jurors who found him guilty. Any suggestion that the current system of death qualification "may be in the defendant's best interests, seems specious unless the state is willing to grant the defendant the option to waive this paternalistic protection in exchange for better odds against conviction." Finch & Ferraro, 65 Neb. L. Rev., at 69. Furthermore, this case will stand as one of the few times in which any legitimacy has been given to the power of a convicted capital defendant facing the possibility of a death sentence to argue as a mitigating factor the chance that he might be innocent. Where a defendant's sentence but not his conviction has been set aside on appeal, States have routinely empaneled juries whose only duty is to assess punishment, thereby depriving defendants of the chance to profit from the "residual doubts" that jurors who had already sat through a guilt phase might bring to the sentencing proceeding. In its statute authorizing resentencing without any reassessment of culpability, Arkansas has noted: "it is a waste of judicial resources to require the retrying of an error-free trial if the State wishes to seek to reimpose the death penalty." 1983 Ark. Gen. Act.

No. 546, § 3, note following Ark. Rev. Stat. Ann. § 41–1358 (Supp. 1985).

But most importantly, it ill-behooves the majority to allude to a defendant's power to appeal to "residual doubts" at his sentencing when this Court has consistently refused to grant certiorari in state cases holding that these doubts cannot properly be considered during capital sentencing proceedings. See *Burr* v. *Florida*, 474 U. S. 879 (1985) (MARSHALL, J., dissenting from denial of certiorari); *Heiney* v. *Florida*, 469 U. S. 920 (1984) (MARSHALL, J., dissenting from denial of certiorari); *Burford* v. *State*, 403 So. 2d 943 (Fla. 1981), cert. denied, 454 U. S. 1164 (1982). Any suggestion that capital defendants will benefit from a single jury thus is more than disingenuous. It is cruel.

VI

On occasion, this Court has declared what I believe should be obvious—that when a State seeks to convict a defendant of the most serious and severely punished offenses in its criminal code, any procedure that "diminish[es] the reliability of the guilt determination" must be struck down. *Beck* v. *Alabama*, 447 U. S., at 638. But in spite of such declarations, I cannot help thinking that respondent here would have stood a far better chance of prevailing on his constitutional claims had he not been challenging a procedure peculiar to the administration of the death penalty. For in no other context would a majority of this Court refuse to find any constitutional violation in a state practice that systematically operates to render juries more likely to convict, and to convict on the more serious charges. I dissent.

CALIFORNIA *v.* CIRAOLO

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

No. 84-1513. Argued December 10, 1985—Decided May 19, 1986

The Santa Clara, Cal., police received an anonymous telephone tip that marijuana was growing in respondent's backyard, which was enclosed by two fences and shielded from view at ground level. Officers who were trained in marijuana identification secured a private airplane, flew over respondent's house at an altitude of 1,000 feet, and readily identified marijuana plants growing in the yard. A search warrant was later obtained on the basis of one of the officer's naked-eye observations; a photograph of the surrounding area taken from the airplane was attached as an exhibit. The warrant was executed, and marijuana plants were seized. After the California trial court denied respondent's motion to suppress the evidence of the search, he pleaded guilty to a charge of cultivation of marijuana. The California Court of Appeal reversed on the ground that the warrantless aerial observation of respondent's yard violated the Fourth Amendment.

Held: The Fourth Amendment was not violated by the naked-eye aerial observation of respondent's backyard. Pp. 211–215.

(a) The touchstone of Fourth Amendment analysis is whether a person has a constitutionally protected reasonable expectation of privacy, which involves the two inquiries of whether the individual manifested a subjective expectation of privacy in the object of the challenged search, and whether society is willing to recognize that expectation as reasonable. *Katz* v. *United States*, 389 U. S. 347. In pursuing the second inquiry, the test of legitimacy is not whether the individual chooses to conceal assertedly "private activity," but whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment. Pp. 211–212.

(b) On the record here, respondent's expectation of privacy from *all* observations of his backyard was unreasonable. That the backyard and its crop were within the "curtilage" of respondent's home did not itself bar all police observation. The mere fact that an individual has taken measures to restrict some views of his activities does not preclude an officer's observation from a public vantage point where he has a right to be and which renders the activities clearly visible. The police observations here took place within public navigable airspace, in a physically nonintrusive manner. The police were able to observe the plants readily discernible to the naked eye as marijuana, and it was irrelevant that the observation from the airplane was directed at identifying the plants and that the officers were trained to recognize marijuana. Any member of the public flying in this airspace who cared to glance down could have seen everything that the officers observed. The Fourth Amendment simply does not require police traveling in the public airways at 1,000 feet to obtain a warrant in order to observe what is visible to the naked eye. Pp. 212–215.

161 Cal. App. 3d 1081, 208 Cal. Rptr. 93, reversed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. POWELL, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 215.

Laurence K. Sullivan, Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs were *John K. Van de Kamp*, Attorney General, *Steve White*, Chief Assistant Attorney General, and *Eugene W. Kaster*, Deputy Attorney General.

Marshall Warren Krause, by appointment of the Court, 472 U. S. 1025, argued the cause for respondent. With him on the brief was *Pamela Holmes Duncan*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Indiana et al. by *Linley E. Pearson*, Attorney General of Indiana, *William E. Daily* and *Lisa M. Paunicka*, Deputy Attorneys General, *Charles A. Graddick*, Attorney General of Alabama, *Charles M. Oberly*, Attorney General of Delaware, *Michael J. Bowers*, Attorney General of Georgia, *Neil F. Hartigan*, Attorney General of Illinois, *Robert T. Stephan*, Attorney General of Kansas, *David L. Armstrong*, Attorney General of Kentucky, *William J. Guste, Jr.*, Attorney General of Louisiana, *James E. Tierney*, Attorney General of Maine, *Francis X. Bellotti*, Attorney General of Massachusetts, *William L. Webster*, Attorney General of Missouri, *Robert M. Spire*, Attorney General-Designate of Nebraska, *Brian McKay*, Attorney General of Nevada, *Stephen E. Merrill*, Attorney General of New Hampshire, *Paul Bardacke*, Attorney General of New Mexico, *Anthony Celebrezze*, Attorney General of Ohio, *LeRoy S. Zimmerman*, Attorney General of Pennsylvania, *Travis Medlock*, Attorney General of South Carolina, *Jeffrey Amestoy*, Attorney General of Vermont, *Gerald L. Baliles*, Attorney General of Virginia, *Kenneth O. Eikenberry*, Attorney General of Washington, and *Archie G. McClintock*, Attorney General of

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to determine whether the Fourth Amendment is violated by aerial observation without a warrant from an altitude of 1,000 feet of a fenced-in backyard within the curtilage of a home.

I

On September 2, 1982, Santa Clara Police received an anonymous telephone tip that marijuana was growing in respondent's backyard. Police were unable to observe the contents of respondent's yard from ground level because of a 6-foot outer fence and a 10-foot inner fence completely enclosing the yard. Later that day, Officer Shutz, who was assigned to investigate, secured a private plane and flew over respondent's house at an altitude of 1,000 feet, within navigable airspace; he was accompanied by Officer Rodriguez. Both officers were trained in marijuana identification. From the overflight, the officers readily identified marijuana plants 8 feet to 10 feet in height growing in a 15- by 25-foot plot in respondent's yard; they photographed the area with a standard 35mm camera.

On September 8, 1982, Officer Shutz obtained a search warrant on the basis of an affidavit describing the anonymous tip and their observations; a photograph depicting respondent's house, the backyard, and neighboring homes was attached to the affidavit as an exhibit. The warrant was

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Wyoming; for Americans for Effective Law Enforcement Inc. et al. by *Fred E. Inbau, Wayne W. Schmidt, James P. Manak, David Crump,* and *Daniel B. Hales;* for the Criminal Justice Legal Foundation by *Christopher N. Heard;* and for the Washington Legal Foundation by *Daniel J. Popeo* and *George C. Smith.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *C. Douglas Floyd, Alan L. Schlosser,* and *Charles S. Sims;* for the Civil Liberties Monitoring Project by *Amitai Schwartz;* and for the National Association of Criminal Defense Lawyers by *John Kenneth Zwerling.*

executed the next day and 73 plants were seized; it is not disputed that these were marijuana.

After the trial court denied respondent's motion to suppress the evidence of the search, respondent pleaded guilty to a charge of cultivation of marijuana. The California Court of Appeal reversed, however, on the ground that the warrantless aerial *observation* of respondent's yard which led to the issuance of the warrant violated the Fourth Amendment. 161 Cal. App. 3d 1081, 208 Cal. Rptr. 93 (1984). That court held first that respondent's backyard marijuana garden was within the "curtilage" of his home, under *Oliver* v. *United States*, 466 U. S. 170 (1984). The court emphasized that the height and existence of the two fences constituted "objective criteria from which we may conclude he manifested a reasonable expectation of privacy by any standard." 161 Cal. App. 3d, at 1089, 208 Cal. Rptr., at 97.

Examining the particular method of surveillance undertaken, the court then found it "significant" that the flyover "was not the result of a routine patrol conducted for any other legitimate law enforcement or public safety objective, but was undertaken for the specific purpose of observing this particular enclosure within [respondent's] curtilage." *Ibid.* It held this focused observation was "a direct and unauthorized intrusion into the sanctity of the home" which violated respondent's reasonable expectation of privacy. *Id.*, at 1089–1090, 208 Cal. Rptr., at 98 (footnote omitted). The California Supreme Court denied the State's petition for review.

We granted the State's petition for certiorari, 471 U. S. 1134 (1985). We reverse.

The State argues that respondent has "knowingly exposed" his backyard to aerial observation, because all that was seen was visible to the naked eye from any aircraft flying overhead. The State analogizes its mode of observation to a knothole or opening in a fence: if there is an opening, the police may look.

The California Court of Appeal, as we noted earlier, accepted the analysis that unlike the casual observation of a private person flying overhead, this flight was focused specifically on a small suburban yard, and was not the result of any routine patrol overflight. Respondent contends he has done all that can reasonably be expected to tell the world he wishes to maintain the privacy of his garden within the curtilage without covering his yard. Such covering, he argues, would defeat its purpose as an outside living area; he asserts he has not "knowingly" exposed himself to aerial views.

II

The touchstone of Fourth Amendment analysis is whether a person has a "constitutionally protected reasonable expectation of privacy." *Katz* v. *United States*, 389 U. S. 347, 360 (1967) (Harlan, J., concurring). *Katz* posits a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable? See *Smith* v. *Maryland*, 442 U. S. 735, 740 (1979).

Clearly—and understandably—respondent has met the test of manifesting his own subjective intent and desire to maintain privacy as to his unlawful agricultural pursuits. However, we need not address that issue, for the State has not challenged the finding of the California Court of Appeal that respondent had such an expectation. It can reasonably be assumed that the 10-foot fence was placed to conceal the marijuana crop from at least street-level views. So far as the normal sidewalk traffic was concerned, this fence served that purpose, because respondent "took normal precautions to maintain his privacy." *Rawlings* v. *Kentucky*, 448 U. S. 98, 105 (1980).

Yet a 10-foot fence might not shield these plants from the eyes of a citizen or a policeman perched on the top of a truck or a two-level bus. Whether respondent therefore manifested a subjective expectation of privacy from *all* observations of his backyard, or whether instead he manifested merely a hope that no one would observe his unlawful gardening pursuits, is not entirely clear in these circumstances. Respondent appears to challenge the authority of government to observe his activity from any vantage point or place if the viewing is motivated by a law enforcement purpose, and not the result of a casual, accidental observation.

We turn, therefore, to the second inquiry under *Katz*, *i. e.*, whether that expectation is reasonable. In pursuing this inquiry, we must keep in mind that "[t]he test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity," but instead "whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *Oliver*, *supra*, at 181–183.

Respondent argues that because his yard was in the curtilage of his home, no governmental aerial observation is permissible under the Fourth Amendment without a warrant.[1] The history and genesis of the curtilage doctrine are instructive. "At common law, the curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" *Oliver*, *supra*, at 180 (quoting *Boyd* v. *United States*, 116 U. S. 616, 630 (1886)). See 4 Blackstone, Commentaries *225. The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened. The claimed area here was immediately adjacent to a suburban home, surrounded by high double fences. This close nexus to the home would appear to encompass this small area within the curtilage. Accepting, as the State does, that this yard and its crop fall within the curtilage, the question remains whether naked-eye observation of the curtilage by police from an aircraft lawfully operating at an altitude of 1,000 feet violates an expectation of privacy that is reasonable.

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[1] Because the parties framed the issue in the California courts below and in this Court as concerning only the reasonableness of aerial observation generally, see Pet. for Cert. i, without raising any distinct issue as to the photograph attached as an exhibit to the affidavit in support of the search warrant, our analysis is similarly circumscribed. It was the officer's observation, not the photograph, that supported the warrant. Officer Shutz testified that the photograph did not identify the marijuana as such because it failed to reveal a "true representation" of the color of the plants: "you have to see it with the naked eye." App. 36.

That the area is within the curtilage does not itself bar all police observation. The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible. *E. g.*, *United States* v. *Knotts*, 460 U. S. 276, 282 (1983). "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz*, *supra*, at 351.

The observations by Officers Shutz and Rodriguez in this case took place within public navigable airspace, see 49 U. S. C. App. § 1304, in a physically nonintrusive manner; from this point they were able to observe plants readily discernible to the naked eye as marijuana. That the observation from aircraft was directed at identifying the plants and the officers were trained to recognize marijuana is irrelevant. Such observation is precisely what a judicial officer needs to provide a basis for a warrant. Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed. On this record, we readily conclude that respondent's expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor.[2]

The dissent contends that the Court ignores Justice Harlan's warning in his concurrence in *Katz* v. *United States*, 389 U. S., at 361–362, that the Fourth Amendment should not be limited to proscribing only physical intrusions onto private property. *Post*, at 215–216. But Justice Harlan's observations about future electronic developments and the potential for electronic interference with private communications, see *Katz*, *supra*, at 362, were plainly not aimed at simple visual observations from a public place. Indeed, since *Katz* the Court has required warrants for electronic surveillance aimed at intercepting private conversations. See *United States* v. *United States District Court*, 407 U. S. 297 (1972).

Justice Harlan made it crystal clear that he was resting on the reality that one who enters a telephone booth is entitled to assume that his conversation is not being intercepted. This does not translate readily into a rule of constitutional dimensions that one who grows illicit drugs in his backyard is "entitled to assume" his unlawful conduct will not be observed by a passing aircraft—or by a power company repair mechanic on a pole overlooking the yard. As Justice Harlan emphasized,

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[2] The California Court of Appeal recognized that police have the right to use navigable airspace, but made a pointed distinction between police aircraft focusing on a particular home and police aircraft engaged in a "routine patrol." It concluded that the officers' "focused" observations violated respondent's reasonable expectations of privacy. In short, that court concluded that a regular police patrol plane identifying respondent's marijuana would lead to a different result. Whether this is a rational distinction is hardly relevant, although we find difficulty understanding exactly how respondent's expectations of privacy from aerial observation might differ when two airplanes pass overhead at identical altitudes, simply for different purposes. We are cited to no authority for this novel analysis or the conclusion it begat. The fact that a ground-level observation by police "focused" on a particular place is not different from a "focused" aerial observation under the Fourth Amendment.

> "a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable." *Katz, supra,* at 361.

One can reasonably doubt that in 1967 Justice Harlan considered an aircraft within the category of future "electronic" developments that could stealthily intrude upon an individual's privacy. In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet. The Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye.[3]

Reversed.

JUSTICE POWELL, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

Concurring in *Katz* v. *United States,* 389 U. S. 347 (1967), Justice Harlan warned that any decision to construe the

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[3] In *Dow Chemical Co.* v. *United States, post,* p. 227, decided today, we hold that the use of an aerial mapping camera to photograph an industrial manufacturing complex from navigable airspace similarly does not require a warrant under the Fourth Amendment. The State acknowledges that "[a]erial observation of curtilage may become invasive, either due to physical intrusiveness or through modern technology which discloses to the senses those intimate associations, objects or activities otherwise imperceptible to police or fellow citizens." Brief for Petitioner 14–15.

Fourth Amendment as proscribing only physical intrusions by police onto private property "is, in the present day, bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion." *Id.*, at 362. Because the Court today ignores that warning in an opinion that departs significantly from the standard developed in *Katz* for deciding when a Fourth Amendment violation has occurred, I dissent.

I

As the Court's opinion reflects, the facts of this case are not complicated. Officer Shutz investigated an anonymous report that marijuana was growing in the backyard of respondent's home. A tall fence prevented Shutz from looking into the yard from the street. The yard was directly behind the home so that the home itself furnished one border of the fence. Shutz proceeded, without obtaining a warrant, to charter a plane and fly over the home at an altitude of 1,000 feet. Observing marijuana plants growing in the fenced-in yard, Shutz photographed respondent's home and yard, as well as homes and yards of neighbors. The photograph clearly shows that the enclosed yard also contained a small swimming pool and patio. Shutz then filed an affidavit, to which he attached the photograph, describing the anonymous tip and his aerial observation of the marijuana. A warrant issued,[1] and a search of the yard confirmed Shutz' aerial observations. Respondent was arrested for cultivating marijuana, a felony under California law.

Respondent contends that the police intruded on his constitutionally protected expectation of privacy when they conducted aerial surveillance of his home and photographed his backyard without first obtaining a warrant. The Court rejects that contention, holding that respondent's expectation of privacy in the curtilage of his home, although reasonable as to intrusions on the ground, was unreasonable as to surveillance from the navigable airspace. In my view, the Court's holding rests on only one obvious fact, namely, that the airspace generally is open to all persons for travel in airplanes. The Court does not explain why this single fact deprives citizens of their privacy interest in outdoor activities in an enclosed curtilage.

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[1] The warrant authorized Shutz to search the home and its attached garage, as well as the yard, for marijuana, narcotics paraphernalia, records relating to marijuana sales, and documents identifying the occupant of the premises.

II

A

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." While the familiar history of the Amendment need not be recounted here,[2] we should remember that it reflects a choice that our society should be one in which citizens "dwell in reasonable security and freedom from surveillance." *Johnson* v. *United States*, 333 U. S. 10, 14 (1948). Since that choice was made by the Framers of the Constitution, our cases construing the Fourth Amendment have relied in part on the common law for instruction on "what sorts of searches the Framers . . . regarded as reasonable." *Steagald* v. *United States*, 451 U. S. 204, 217 (1981). But we have repeatedly refused to freeze "'into constitutional law those enforcement practices that existed at the time of the Fourth Amendment's passage.'" *Id.*, at 217, n. 10, quoting *Payton* v. *New York*, 445 U. S. 573, 591, n. 33 (1980). See *United States* v. *United States District Court*, 407 U. S. 297, 313 (1972). Rather, we have construed the Amendment "'in light of contemporary norms and conditions,'" *Steagald* v. *United States*, *supra*, at 217, n. 10, quoting *Payton* v. *New York*, *supra*, at 591, n. 33, in order to prevent "any stealthy encroachments" on our citizens' right to be free of arbitrary official intrusion,

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[2] See, *e. g.*, *Payton* v. *New York*, 445 U. S. 573, 583–585, n. 20 (1980).

Boyd v. *United States*, 116 U. S. 616, 635 (1886). Since the landmark decision in *Katz* v. *United States*, the Court has fulfilled its duty to protect Fourth Amendment rights by asking if police surveillance has intruded on an individual's reasonable expectation of privacy.

As the decision in *Katz* held, and dissenting opinions written by Justices of this Court prior to *Katz* recognized, *e. g., Goldman* v. *United States*, 316 U. S. 129, 139–141 (1942) (Murphy, J., dissenting); *Olmstead* v. *United States*, 277 U. S. 438, 474 (1928) (Brandeis, J., dissenting), a standard that defines a Fourth Amendment "search" by reference to whether police have physically invaded a "constitutionally protected area" provides no real protection against surveillance techniques made possible through technology. Technological advances have enabled police to see people's activities and associations, and to hear their conversations, without being in physical proximity. Moreover, the capability now exists for police to conduct intrusive surveillance without any physical penetration of the walls of homes or other structures that citizens may believe shelters their privacy.[3] Looking to the Fourth Amendment for protection against such "broad and unsuspected governmental incursions" into the "cherished privacy of law-abiding citizens," *United States* v. *United States District Court*, *supra*, at

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[3] As was said more than four decades ago: "[T]he search of one's home or office no longer requires physical entry for science has brought forth far more effective devices for the invasion of a person's privacy than the direct and obvious methods of oppression which were detested by our forbears and which inspired the Fourth Amendment. . . . Whether the search of private quarters is accomplished by placing on the outer walls of the sanctum a detectaphone that transmits to the outside listener the intimate details of a private conversation, or by new methods of photography that penetrate walls or overcome distances, the privacy of the citizen is equally invaded by the Government and intimate personal matters are laid bare to view." *Goldman* v. *United States*, 316 U. S. 129, 139 (1942) (Murphy, J., dissenting). Since 1942, science has developed even more sophisticated means of surveillance.

312–313 (footnote omitted), the Court in *Katz* abandoned its inquiry into whether police had committed a physical trespass. *Katz* announced a standard under which the occurrence of a search turned not on the physical position of the police conducting the surveillance, but on whether the surveillance in question had invaded a constitutionally protected reasonable expectation of privacy.

Our decisions following the teaching of *Katz* illustrate that this inquiry "normally embraces two discrete questions." *Smith* v. *Maryland*, 442 U. S. 735, 740 (1979). "The first is whether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy.'" *Ibid.*, quoting *Katz* v. *United States*, 389 U. S., at 361 (Harlan, J., concurring). The second is whether that subjective expectation "is 'one that society is prepared to recognize as "reasonable."'" 442 U. S., at 740, quoting *Katz* v. *United States*, *supra*, at 361 (Harlan, J., concurring). While the Court today purports to reaffirm this analytical framework, its conclusory rejection of respondent's expectation of privacy in the yard of his residence as one that "is unreasonable," *ante*, at 213, represents a turning away from the principles that have guided our Fourth Amendment inquiry. The Court's rejection of respondent's Fourth Amendment claim is curiously at odds with its purported reaffirmation of the curtilage doctrine, both in this decision and its companion case, *Dow Chemical Co.* v. *United States*, *post*, p. 227, and particularly with its conclusion in *Dow* that society is prepared to recognize as reasonable expectations of privacy in the curtilage, *post*, at 235.

The second question under *Katz* has been described as asking whether an expectation of privacy is "legitimate in the sense required by the Fourth Amendment."[4] *Oliver* v.

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[4] In Justice Harlan's classic description, an actual expectation of privacy is entitled to Fourth Amendment protection if it is an expectation that society recognizes as "reasonable." *Katz* v. *United States*, 389 U. S., at 361 (Harlan, J., concurring). Since *Katz*, our decisions also have de-

United States, 466 U. S. 170, 182 (1984). The answer turns on "whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *Id.*, at 182–183. While no single consideration has been regarded as dispositive, "the Court has given weight to such factors as the intention of the Framers of the Fourth Amendment, . . . the uses to which the individual has put a location, . . . and our societal understanding that certain areas deserve the most scrupulous protection from government invasion."[5] *Id.*, at 178. Our decisions have made clear that this inquiry often must be decided by "reference to a 'place,'" *Katz* v. *United States*, *supra*, at 361 (Harlan, J., concurring); see *Payton* v. *New York*, 445 U. S., at 589, and that a home is a place in which a subjective expectation of privacy virtually always will be legitimate, *ibid.*; see, *e. g.*, *United States* v. *Karo*, 468 U. S. 705, 713–715 (1984); *Steagald* v. *United States*, 451 U. S., at 211–212. "At the very core [of the Fourth Amendment] stands the right of a [person] to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman* v. *United States*, 365 U. S. 505, 511 (1961).

B

This case involves surveillance of a home, for as we stated in *Oliver* v. *United States*, the curtilage "has been considered part of the home itself for Fourth Amendment purposes." 466 U. S., at 180. In *Dow Chemical Co.* v. *United States*,

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scribed constitutionally protected privacy interests as those that society regards as "legitimate," using the words "reasonable" and "legitimate" interchangeably. *E. g.*, *Oliver* v. *United States*, 466 U. S. 170 (1984); *Rakas* v. *Illinois*, 439 U. S. 128, 143–144, n. 12 (1978).

[5] "Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Ibid.* This inquiry necessarily focuses on personal interests in privacy and liberty recognized by a free society.

decided today, the Court reaffirms that the "curtilage doctrine evolved to protect much the same kind of privacy as that covering the interior of a structure." *Post,* at 235. The Court in *Dow* emphasizes, moreover, that society accepts as reasonable citizens' expectations of privacy in the area immediately surrounding their homes. *Ibid.*

In deciding whether an area is within the curtilage, courts "have defined the curtilage, as did the common law, by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private. See, *e. g., United States* v. *Van Dyke,* 643 F. 2d 992, 993–994 (CA4 1981); *United States* v. *Williams,* 581 F. 2d 451, 453 (CA5 1978); *Care* v. *United States,* 231 F. 2d 22, 25 (CA10), cert. denied, 351 U. S. 932 (1956)." *Oliver* v. *United States, supra,* at 180. The lower federal courts have agreed that the curtilage is "an area of domestic use immediately surrounding a dwelling and usually but not always fenced in with the dwelling."[6] *United States* v. *LaBerge,* 267 F. Supp. 686, 692 (Md. 1967); see *United States* v. *Van Dyke,* 643 F. 2d 992, 993, n. 1 (CA4 1984). Those courts also have held that whether an area is within the curtilage must be decided by looking at all of the facts. *Ibid.,* citing *Care* v. *United States, supra,* at 25. Relevant facts include the proximity between the area claimed to be curtilage and the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by. See *Care* v. *United States, supra,* at 25; see also *United States* v. *Van Dyke, supra,* at 993–994.

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[6] The Oxford English Dictionary defines curtilage as "a small court, yard, garth, or piece of ground attached to a dwelling-house, and forming one enclosure with it, or so regarded by the law; the area attached to and containing a dwelling-house and its out-buildings." 2 Oxford English Dictionary 1278 (1933).

III

A

The Court begins its analysis of the Fourth Amendment issue posed here by deciding that respondent had an expectation of privacy in his backyard. I agree with that conclusion because of the close proximity of the yard to the house, the nature of some of the activities respondent conducted there,[7] and because he had taken steps to shield those activities from the view of passersby. The Court then implicitly acknowledges that society is prepared to recognize his expectation as reasonable with respect to ground-level surveillance, holding that the yard was within the curtilage, an area in which privacy interests have been afforded the "most heightened" protection. *Ante*, at 213. As the foregoing discussion of the curtilage doctrine demonstrates, respondent's yard unquestionably was within the curtilage. Since Officer Shutz could not see into this private family area from the street, the Court certainly would agree that he would have conducted an unreasonable search had he climbed over the fence, or used a ladder to peer into the yard without first securing a warrant. See *United States* v. *Van Dyke, supra;* see also *United States* v. *Williams*, 581 F. 2d 451 (CA5 1978).

The Court concludes, nevertheless, that Shutz could use an airplane—a product of modern technology—to intrude visually into respondent's yard. The Court argues that respondent had no reasonable expectation of privacy from aerial observation. It notes that Shutz was "within public navigable airspace," *ante*, at 213, when he looked into and photographed respondent's yard. It then relies on the fact that the surveillance was not accompanied by a physical invasion of the curtilage, *ibid.* Reliance on the *manner* of surveillance is directly contrary to the standard of *Katz*, which identifies a constitutionally protected privacy right by focusing on the interests of the individual and of a free society. Since *Katz*, we have consistently held that the presence or absence of physical trespass by police is constitutionally irrelevant to the question whether society is prepared to recognize an asserted privacy interest as reasonable. *E. g.*, *United States* v. *United States District Court*, 407 U. S., at 313.

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[7] The Court omits any reference to the fact that respondent's yard contained a swimming pool and a patio for sunbathing and other private activities. At the suppression hearing, respondent sought to introduce evidence showing that he did use his yard for domestic activities. The trial court refused to consider that evidence. Tr. on Appeal 5–8 (Aug. 15, 1983).

The Court's holding, therefore, must rest solely on the fact that members of the public fly in planes and may look down at homes as they fly over them. *Ante*, at 213–214. The Court does not explain why it finds this fact to be significant. One may assume that the Court believes that citizens bear the risk that air travelers will observe activities occurring within backyards that are open to the sun and air. This risk, the Court appears to hold, nullifies expectations of privacy in those yards even as to purposeful police surveillance from the air. The Court finds support for this conclusion in *United States* v. *Knotts*, 460 U. S. 276 (1983). *Ante*, at 213.

This line of reasoning is flawed. First, the actual risk to privacy from commercial or pleasure aircraft is virtually nonexistent. Travelers on commercial flights, as well as private planes used for business or personal reasons, normally obtain at most a fleeting, anonymous, and nondiscriminating glimpse of the landscape and buildings over which they pass.[8] The risk that a passenger on such a plane might observe private activities, and might connect those activities with particular people, is simply too trivial to protect against. It is no accident that, as a matter of common experience, many people build fences around their residential areas, but few build roofs over their backyards. Therefore, contrary to the Court's suggestion, *ante*, at 213, people do not "'knowingly expos[e]'" their residential yards "'to the public'" merely by failing to build barriers that prevent aerial surveillance.

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[8] Of course, during takeoff and landing, planes briefly fly at low enough altitudes to afford fleeting opportunities to observe some types of activity in the curtilages of residents who live within the strictly regulated takeoff and landing zones. As all of us know from personal experience, at least in passenger aircrafts, there rarely—if ever—is an opportunity for a practical observation and photographing of unlawful activity similar to that obtained by Officer Shutz in this case. The Court's analogy to commercial and private overflights, therefore, is wholly without merit.

The Court's reliance on *Knotts* reveals the second problem with its analysis. The activities under surveillance in *Knotts* took place on public streets, not in private homes. 460 U. S., at 281–282. Comings and goings on public streets are public matters, and the Constitution does not disable police from observing what every member of the public can see. The activity in this case, by contrast, took place within the private area immediately adjacent to a home. Yet the Court approves purposeful police surveillance of that activity and area similar to that approved in *Knotts* with respect to public activities and areas. The only possible basis for this holding is a judgment that the risk to privacy posed by the remote possibility that a private airplane passenger will notice outdoor activities is equivalent to the risk of official aerial surveillance.[9] But the Court fails to acknowledge the qualitative difference between police surveillance and other uses made of the airspace. Members of the public use the airspace for travel, business, or pleasure, not for the purpose of observing activities taking place within residential yards. Here, police conducted an overflight at low altitude solely for the purpose of discovering evidence of crime within a private enclave into which they were constitutionally forbidden to intrude at ground level without a warrant. It is not easy to believe that our society is prepared to force individuals to bear the risk of this type of warrantless police intrusion into their residential areas.[10]

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[9] Some of our precedents have held that an expectation of privacy was not reasonable in part because the individual had assumed the risk that certain kinds of private information would be turned over to the police. *United States* v. *Miller*, 425 U. S. 435, 443 (1976). None of the prior decisions of this Court is a precedent for today's decision. As JUSTICE MARSHALL has observed, it is our duty to be sensitive to the risks that a citizen "should be forced to assume in a free and open society." *Smith* v. *Maryland*, 442 U. S. 735, 750 (1979) (dissenting opinion).

B

Since respondent had a reasonable expectation of privacy in his yard, aerial surveillance undertaken by the police for the purpose of discovering evidence of crime constituted a "search" within the meaning of the Fourth Amendment. "Warrantless searches are presumptively unreasonable, though the Court has recognized a few limited exceptions to this general rule." *United States* v. *Karo*, 468 U. S., at 717. This case presents no such exception. The indiscriminate nature of aerial surveillance, illustrated by Officer Shutz' photograph of respondent's home and enclosed yard as well as those of his neighbors, poses "far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight." *Id.*, at 716 (footnote omitted). Therefore, I would affirm the judgment of the California Court of Appeal ordering suppression of the marijuana plants.

IV

Some may believe that this case, involving no physical intrusion on private property, presents "the obnoxious thing in its mildest and least repulsive form." *Boyd* v. *United*

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[10] The Court's decision has serious implications for outdoor family activities conducted in the curtilage of a home. The feature of such activities that makes them desirable to citizens living in a free society, namely, the fact that they occur in the open air and sunlight, is relied on by the Court as a justification for permitting police to conduct warrantless surveillance at will. Aerial surveillance is nearly as intrusive on family privacy as physical trespass into the curtilage. It would appear that, after today, families can expect to be free of official surveillance only when they retreat behind the walls of their homes.

States, 116 U. S., at 635. But this Court recognized long ago that the essence of a Fourth Amendment violation is "not the breaking of [a person's] doors, and the rummaging of his drawers," but rather is "the invasion of his indefeasible right of personal security, personal liberty and private property." *Id.*, at 630. Rapidly advancing technology now permits police to conduct surveillance in the home itself, an area where privacy interests are most cherished in our society, without any physical trespass. While the rule in *Katz* was designed to prevent silent and unseen invasions of Fourth Amendment privacy rights in a variety of settings, we have consistently afforded heightened protection to a person's right to be left alone in the privacy of his house. The Court fails to enforce that right or to give any weight to the long-standing presumption that warrantless intrusions into the home are unreasonable.[11] I dissent.

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[11] Of course, the right of privacy in the home and its curtilage includes no right to engage in unlawful conduct there. But the Fourth Amendment requires police to secure a warrant before they may intrude on that privacy to search for evidence of suspected crime. *United States* v. *Karo*, 468 U. S. 705, 713–715 (1984).

DOW CHEMICAL CO. *v.* UNITED STATES, BY AND THROUGH ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 84–1259. Argued December 10, 1985—Decided May 19, 1986

Petitioner operates a 2,000-acre chemical plant consisting of numerous covered buildings, with outdoor manufacturing equipment and piping conduits located between the various buildings exposed to visual observation from the air. Petitioner maintains elaborate security around the perimeter of the complex, barring ground-level public views of the area. When petitioner denied a request by the Environmental Protection Agency (EPA) for an on-site inspection of the plant, EPA did not seek an administrative search warrant, but instead employed a commercial aerial photographer, using a standard precision aerial mapping camera, to take photographs of the facility from various altitudes, all of which were within lawful navigable airspace. Upon becoming aware of the aerial photography, petitioner brought suit in Federal District Court, alleging that EPA's action violated the Fourth Amendment and was beyond its statutory investigative authority. The District Court granted summary judgment for petitioner, but the Court of Appeals reversed, holding that EPA's aerial observation did not exceed its investigatory authority and that the aerial photography of petitioner's plant complex without a warrant was not a search prohibited by the Fourth Amendment.

Held:

1. The fact that aerial photography by petitioner's competitors might be barred by state trade secrets law is irrelevant to the questions presented in this case. Governments do not generally seek to appropriate trade secrets of the private sector, and the right to be free of appropriation of trade secrets is protected by law. Moreover, state tort law governing unfair competition does not define the limits of the Fourth Amendment. Pp. 231–233.

2. The use of aerial observation and photography is within EPA's statutory authority. When Congress invests an agency such as EPA with enforcement and investigatory authority, it is not necessary to identify explicitly every technique that may be used in the course of executing the statutory mission. Although § 114(a) of the Clean Air Act, which provides for EPA's right of entry to premises for inspection purposes,

does not authorize aerial observation, that section appears to expand, not restrict, EPA's general investigatory powers, and there is no suggestion in the statute that the powers conferred by § 114(a) are intended to be exclusive. EPA needs no explicit statutory provision to employ methods of observation commonly available to the public at large. Pp. 233–234.

3. EPA's taking, without a warrant, of aerial photographs of petitioner's plant complex from an aircraft lawfully in public navigable airspace was not a search prohibited by the Fourth Amendment. The open areas of an industrial plant complex such as petitioner's are not analogous to the "curtilage" of a dwelling, which is entitled to protection as a place where the occupants have a reasonable and legitimate expectation of privacy that society is prepared to accept. See *California* v. *Ciraolo*, *ante*, p. 207. The intimate activities associated with family privacy and the home and its curtilage simply do not reach the outdoor areas or spaces between structures and buildings of a manufacturing plant. For purposes of aerial surveillance, the open areas of an industrial complex are more comparable to an "open field" in which an individual may not legitimately demand privacy. *Oliver* v. *United States*, 466 U. S. 170. Here, EPA was not employing some unique sensory device not available to the public, but rather was employing a conventional, albeit precise, commercial camera commonly used in mapmaking. The photographs were not so revealing of intimate details as to raise constitutional concerns. The mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems. Pp. 234–239.

749 F. 2d 307, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined, and in Part III of which BRENNAN, MARSHALL, BLACKMUN, and POWELL, JJ., joined. POWELL, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 240.

Jane M. Gootee argued the cause for petitioner. With her on the briefs were *James H. Hanes* and *Bernd W. Sandt*.

Alan I. Horowitz argued the cause for the United States. With him on the brief were *Acting Solicitor General Wallace*, *Assistant Attorney General Habicht*, *Deputy Solicitor General Frey*, *Dirk D. Snel*, and *Anne S. Almy*.*

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America et al. by *Robin S. Conrad*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to review the holding of the Court of Appeals (a) that the Environmental Protection Agency's aerial observation of petitioner's plant complex did not exceed EPA's statutory investigatory authority, and (b) that EPA's aerial photography of petitioner's 2,000-acre plant complex without a warrant was not a search under the Fourth Amendment.

I

Petitioner Dow Chemical Co. operates a 2,000-acre facility manufacturing chemicals at Midland, Michigan. The facility consists of numerous covered buildings, with manufacturing equipment and piping conduits located between the various buildings exposed to visual observation from the air. At all times, Dow has maintained elaborate security around the perimeter of the complex barring ground-level public views of these areas. It also investigates any low-level flights by aircraft over the facility. Dow has not undertaken, however, to conceal all manufacturing equipment within the complex from aerial views. Dow maintains that the cost of covering its exposed equipment would be prohibitive.

In early 1978, enforcement officials of EPA, with Dow's consent, made an on-site inspection of two powerplants in this complex. A subsequent EPA request for a second inspection, however, was denied, and EPA did not thereafter seek an administrative search warrant. Instead, EPA employed a commercial aerial photographer, using a standard floor-mounted, precision aerial mapping camera, to take photographs of the facility from altitudes of 12,000, 3,000, and 1,200 feet. At all times the aircraft was lawfully within navigable airspace. See 49 U. S. C. App. § 1304; 14 CFR § 91.79 (1985).

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and *Constance E. Brooks;* and for the Michigan Manufacturers' Association et al. by *John M. Cannon*, *Susan W. Wanat*, and *Ann Plunkett Sheldon.*

EPA did not inform Dow of this aerial photography, but when Dow became aware of it, Dow brought suit in the District Court alleging that EPA's action violated the Fourth Amendment and was beyond EPA's statutory investigative authority. The District Court granted Dow's motion for summary judgment on the ground that EPA had no authority to take aerial photographs and that doing so was a search violating the Fourth Amendment. EPA was permanently enjoined from taking aerial photographs of Dow's premises and from disseminating, releasing, or copying the photographs already taken. 536 F. Supp. 1355 (ED Mich. 1982).

The District Court accepted the parties' concession that EPA's "'quest for evidence'" was a "search," *id.*, at 1358, and limited its analysis to whether the search was unreasonable under *Katz* v. *United States*, 389 U. S. 347 (1967). Proceeding on the assumption that a search in Fourth Amendment terms had been conducted, the court found that Dow manifested an expectation of privacy in its exposed plant areas because it intentionally surrounded them with buildings and other enclosures. 536 F. Supp., at 1364–1366.

The District Court held that this expectation of privacy was reasonable, as reflected in part by trade secret protections restricting Dow's commercial competitors from aerial photography of these exposed areas. *Id.*, at 1366–1369. The court emphasized that use of "the finest precision aerial camera available" permitted EPA to capture on film "a great deal more than the human eye could ever see." *Id.*, at 1367.

The Court of Appeals reversed. 749 F. 2d 307 (CA6 1984). It recognized that Dow indeed had a subjective expectation of privacy in certain areas from *ground*-level intrusions, but the court was not persuaded that Dow had a subjective expectation of being free from *aerial* surveillance since Dow had taken no precautions against such observation, in contrast to its elaborate ground-level precautions. *Id.*, at 313. The court rejected the argument that it was not feasible to shield any of the critical parts of the exposed plant areas from aerial surveys. *Id.*, at 312–313. The Court of Appeals, however, did not explicitly reject the District Court's factual finding as to Dow's subjective expectations.

Accepting the District Court finding of Dow's privacy expectation, the Court of Appeals held that it was not a reasonable expectation "[w]hen the entity observed is a multibuilding complex, and the area observed is the outside of these buildings and the spaces in between the buildings." *Id.*, at 313. Viewing Dow's facility to be more like the "open field" in *Oliver* v. *United States*, 466 U. S. 170 (1984), than a home or an office, it held that the common-law curtilage doctrine did not apply to a large industrial complex of closed buildings connected by pipes, conduits, and other exposed manufacturing equipment. 749 F. 2d, at 313–314. The Court of Appeals looked to "the peculiarly strong concepts of intimacy, personal autonomy and privacy associated with the home" as the basis for the curtilage protection. *Id.*, at 314. The court did not view the use of sophisticated photographic equipment by EPA as controlling.

The Court of Appeals then held that EPA clearly acted within its statutory powers even absent express authorization for aerial surveillance, concluding that the delegation of general investigative authority to EPA, similar to that of other law enforcement agencies, was sufficient to support the use of aerial photography. *Id.*, at 315.

II

The photographs at issue in this case are essentially like those commonly used in mapmaking. Any person with an airplane and an aerial camera could readily duplicate them. In common with much else, the technology of photography has changed in this century. These developments have enhanced industrial processes, and indeed all areas of life; they have also enhanced law enforcement techniques. Whether they may be employed by competitors to penetrate trade secrets is not a question presented in this case. Governments do not generally seek to appropriate trade secrets of the private sector, and the right to be free of appropriation of trade secrets is protected by law.

Dow nevertheless relies heavily on its claim that trade secret laws protect it from any aerial photography of this industrial complex by its competitors, and that this protection is relevant to our analysis of such photography under the Fourth Amendment. That such photography might be barred by state law with regard to competitors, however, is irrelevant to the questions presented here. State tort law governing unfair competition does not define the limits of the Fourth Amendment. Cf. *Oliver* v. *United States, supra* (trespass law does not necessarily define limits of Fourth Amendment). The Government is seeking these photographs in order to regulate, not to compete with, Dow. If the Government were to use the photographs to compete with Dow, Dow might have a Fifth Amendment "taking" claim. Indeed, Dow alleged such a claim in its complaint, but the District Court dismissed it without prejudice. But even trade secret laws would not bar all forms of photography of this industrial complex; rather, only photography with an intent to use any trade secrets revealed by the photographs may be proscribed. Hence, there is no prohibition of photographs taken by a casual passenger on an airliner, or those taken by a company producing maps for its mapmaking purposes.

Dow claims first that EPA has no authority to use aerial photography to implement its statutory authority for "site inspection" under § 114(a) of the Clean Air Act, 42 U. S. C. § 7414(a);[1] second, Dow claims EPA's use of aerial photogra-

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[1] Section 114(a)(2) provides:

"(2) the Administrator or his authorized representative, upon presentation of his credentials—

"(A) shall have a right of entry to, upon, or through any premises of such person or in which any records required to be maintained under paragraph (1) of this section are located, and

"(B) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under paragraph (1), phy was a "search" of an area that, notwithstanding the large size of the plant, was within an "industrial curtilage" rather than an "open field," and that it had a reasonable expectation of privacy from such photography protected by the Fourth Amendment.

III

Congress has vested in EPA certain investigatory and enforcement authority, without spelling out precisely how this authority was to be exercised in all the myriad circumstances that might arise in monitoring matters relating to clean air and water standards. When Congress invests an agency with enforcement and investigatory authority, it is not necessary to identify explicitly each and every technique that may be used in the course of executing the statutory mission. Aerial observation authority, for example, is not usually expressly extended to police for traffic control, but it could hardly be thought necessary for a legislative body to tell police that aerial observation could be employed for traffic control of a metropolitan area, or to expressly authorize police to send messages to ground highway patrols that a particular over-the-road truck was traveling in excess of 55 miles per hour. Common sense and ordinary human experience teach that traffic violators are apprehended by observation.

Regulatory or enforcement authority generally carries with it all the modes of inquiry and investigation traditionally employed or useful to execute the authority granted. Environmental standards such as clean air and clean water cannot be enforced only in libraries and laboratories, helpful as those institutions may be.

Under § 114(a)(2), the Clean Air Act provides that "upon presentation of . . . credentials," EPA has a "right of entry to, upon, or through any premises." 42 U. S. C. § 7414(a)(2)(A). Dow argues this limited grant of authority to enter does not

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and sample any emissions which such person is required to sample under paragraph (1)."

authorize any aerial observation. In particular, Dow argues that unannounced aerial observation deprives Dow of its right to be informed that an inspection will be made or has occurred, and its right to claim confidentiality of the information contained in the places to be photographed, as provided in §§ 114(a) and (c), 42 U. S. C. §§ 7414(a) and (c). It is not claimed that EPA has disclosed any of the photographs outside the agency.

Section 114(a), however, appears to expand, not restrict, EPA's general powers to investigate. Nor is there any suggestion in the statute that the powers conferred by this section are intended to be exclusive. There is no claim that EPA is prohibited from taking photographs from a ground-level location accessible to the general public. EPA, as a regulatory and enforcement agency, needs no explicit statutory provision to employ methods of observation commonly available to the public at large: we hold that the use of aerial observation and photography is within EPA's statutory authority.[2]

IV

We turn now to Dow's contention that taking aerial photographs constituted a search without a warrant, thereby violating Dow's rights under the Fourth Amendment. In making this contention, however, Dow concedes that a simple flyover with naked-eye observation, or the taking of a photograph from a nearby hillside overlooking such a facility, would give rise to no Fourth Amendment problem.

In *California* v. *Ciraolo*, *ante*, p. 207, decided today, we hold that naked-eye aerial observation from an altitude of

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[2] Assuming the Clean Air Act's explicit provisions for protecting trade secrets obtained by EPA as the result of its investigative efforts is somehow deemed inapplicable to the information obtained here, see 42 U. S. C. § 7414(c), Dow's fear that EPA might disclose trade secrets revealed in these photographs appears adequately addressed by federal law prohibiting such disclosure generally under the Trade Secrets Act, 18 U. S. C. § 1905, and the Freedom of Information Act, 5 U. S. C. § 552(b)(4). See *Chrysler Corp.* v. *Brown*, 441 U. S. 281 (1979).

1,000 feet of a backyard within the curtilage of a home does not constitute a search under the Fourth Amendment.

In the instant case, two additional Fourth Amendment claims are presented: whether the common-law "curtilage" doctrine encompasses a large industrial complex such as Dow's, and whether photography employing an aerial mapping camera is permissible in this context. Dow argues that an industrial plant, even one occupying 2,000 acres, does not fall within the "open fields" doctrine of *Oliver* v. *United States* but rather is an "industrial curtilage" having constitutional protection equivalent to that of the curtilage of a private home. Dow further contends that any aerial photography of this "industrial curtilage" intrudes upon its reasonable expectations of privacy. Plainly a business establishment or an industrial or commercial facility enjoys certain protections under the Fourth Amendment. See *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307 (1978); *See* v. *City of Seattle*, 387 U. S. 541 (1967).

Two lines of cases are relevant to the inquiry: the curtilage doctrine and the "open fields" doctrine. The curtilage area immediately surrounding a private house has long been given protection as a place where the occupants have a reasonable and legitimate expectation of privacy that society is prepared to accept. See *Ciraolo*, *supra*.

As the curtilage doctrine evolved to protect much the same kind of privacy as that covering the interior of a structure, the contrasting "open fields" doctrine evolved as well. From *Hester* v. *United States*, 265 U. S. 57 (1924), to *Oliver* v. *United States*, 466 U. S. 170 (1984), the Court has drawn a line as to what expectations are reasonable in the open areas beyond the curtilage of a dwelling: "open fields do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from governmental interference or surveillance." *Oliver*, 466 U. S., at 179. In *Oliver*, we held that "an individual may not legitimately demand privacy for activities out of doors in fields, except in the area immediately surrounding the home." *Id.*, at 178. To fall within the "open fields" doctrine the area "need be neither 'open' nor a 'field' as those terms are used in common speech." *Id.*, at 180, n. 11.

Dow plainly has a reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings, and it is equally clear that expectation is one society is prepared to observe. *E. g., See* v. *City of Seattle, supra.* Moreover, it could hardly be expected that Dow would erect a huge cover over a 2,000-acre tract. In contending that its entire enclosed plant complex is an "industrial curtilage," Dow argues that its exposed manufacturing facilities are analogous to the curtilage surrounding a home because it has taken every possible step to bar access from ground level.

The Court of Appeals held that whatever the limits of an "industrial curtilage" barring *ground*-level intrusions into Dow's private areas, the open areas exposed here were more analogous to "open fields" than to a curtilage for purposes of aerial observation. 749 F. 2d, at 312–314. In *Oliver*, the Court described the curtilage of a dwelling as "the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" 466 U. S., at 180 (quoting *Boyd* v. *United States*, 116 U. S. 616, 630 (1886)). See *California* v. *Ciraolo, supra.* The intimate activities associated with family privacy and the home and its curtilage simply do not reach the outdoor areas or spaces between structures and buildings of a manufacturing plant.

Admittedly, Dow's enclosed plant complex, like the area in *Oliver*, does not fall precisely within the "open fields" doctrine. The area at issue here can perhaps be seen as falling somewhere between "open fields" and curtilage, but lacking some of the critical characteristics of both.[3] Dow's inner manufacturing areas are elaborately secured to ensure they are not open or exposed to the public from the ground. Any actual physical entry by EPA into any enclosed area would raise significantly different questions, because "[t]he businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *See* v. *City of Seattle, supra,* at 543. The narrow issue raised by Dow's claim of search and seizure, however, concerns aerial observation of a 2,000-acre outdoor manufacturing facility *without* physical entry.[4]

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[3] In *Oliver*, we observed that "for most homes, the boundaries of the curtilage will be clearly marked; and the conception defining the curtilage—as the area around the home to which the activity of home life extends—is a familiar one easily understood from our daily experience." 466

We pointed out in *Donovan* v. *Dewey,* 452 U. S. 594, 598–599 (1981), that the Government has "greater latitude to conduct warrantless inspections of commercial property" because "the expectation of privacy that the owner of commercial property enjoys in such property differs significantly

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U. S., at 182, n. 12. While we did not attempt to definitively mark the boundaries of what constitutes an open field, we noted that "[i]t is clear . . . that the term 'open fields' may include any unoccupied or undeveloped area outside of the curtilage." *Id.,* at 180, n. 11. As *Oliver* recognized, the curtilage surrounding a home is generally a well-defined, limited area. In stark contrast, the areas for which Dow claims enhanced protection cover the equivalent of a half dozen family farms.

[4] We find it important that this is *not* an area immediately adjacent to a private home, where privacy expectations are most heightened. Nor is this an area where Dow has made any effort to protect against aerial surveillance. Contrary to the partial dissent's understanding, *post,* at 241–242, the Court of Appeals emphasized:

> "Dow did not take *any* precautions against aerial intrusions, even though the plant was near an airport and within the pattern of planes landing and taking off. If elaborate and expensive measures for ground security show that Dow has an actual expectation of privacy in ground security, as Dow argues, then taking *no* measure for aerial security should say something about its actual privacy expectation in being free from aerial observation." 749 F. 2d 307, 312 (CA6 1984) (emphasis added).

Simply keeping track of the identification numbers of any planes flying overhead, with a later followup to see if photographs were taken, does not constitute a "procedur[e] designed to protect the facility from aerial photography." *Post,* at 241.

from the sanctity accorded an individual's home." We emphasized that unlike a homeowner's interest in his dwelling, "[t]he interest of the owner of commercial property is not one in being free from any inspections." *Id.*, at 599. And with regard to regulatory inspections, we have held that "[w]hat is observable by the public is observable without a warrant, by the Government inspector as well." *Marshall* v. *Barlow's, Inc.*, 436 U. S., at 315 (footnote omitted).

Oliver recognized that in the open field context, "the public and police lawfully may survey lands from the air." 466 U. S., at 179 (footnote omitted). Here, EPA was not employing some unique sensory device that, for example, could penetrate the walls of buildings and record conversations in Dow's plants, offices, or laboratories, but rather a conventional, albeit precise, commercial camera commonly used in mapmaking. The Government asserts it has not yet enlarged the photographs to any significant degree, but Dow points out that simple magnification permits identification of objects such as wires as small as ½-inch in diameter.

It may well be, as the Government concedes, that surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant. But the photographs here are not so revealing of intimate details as to raise constitutional concerns. Although they undoubtedly give EPA more detailed information than naked-eye views, they remain limited to an outline of the facility's buildings and equipment. The mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems.[5]

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[5] The partial dissent emphasizes Dow's claim that under magnification power lines as small as ½-inch in diameter can be observed. *Post*, at 243. But a glance at the photographs in issue shows that those power lines are observable only because of their stark contrast with the snow-white background. No objects as small as ½-inch in diameter such as a class ring, for example, are recognizable, nor are there any identifiable human faces or

An electronic device to penetrate walls or windows so as to hear and record confidential discussions of chemical formulae or other trade secrets would raise very different and far more serious questions; other protections such as trade secret laws are available to protect commercial activities from private surveillance by competitors.[6]

We conclude that the open areas of an industrial plant complex with numerous plant structures spread over an area of 2,000 acres are not analogous to the "curtilage" of a dwelling for purposes of aerial surveillance;[7] such an industrial complex is more comparable to an open field and as such it is open to the view and observation of persons in aircraft lawfully in the public airspace immediately above or sufficiently near the area for the reach of cameras.

We hold that the taking of aerial photographs of an industrial plant complex from navigable airspace is not a search prohibited by the Fourth Amendment.

Affirmed.

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secret documents captured in such a fashion as to implicate more serious privacy concerns. Fourth Amendment cases must be decided on the facts of each case, not by extravagant generalizations. "[W]e have never held that potential, as opposed to actual, invasions of privacy constitute searches for purposes of the Fourth Amendment." *United States* v. *Karo*, 468 U. S. 705, 712 (1984). On these facts, nothing in these photographs suggests that any reasonable expectations of privacy have been infringed.

[6] The partial dissent relies heavily on Dow's claim that aerial photography of its facility is proscribed by trade secret laws. *Post*, at 248–249, and n. 11. While such laws may protect against use of photography by competitors in the same trade to advance their commercial interests, in no manner do "those laws constitute society's express determination" that *all* photography of Dow's facility violates reasonable expectations of privacy. *Post*, at 249. No trade secret law cited to us by Dow proscribes the use of aerial photography of Dow's facilities for law enforcement purposes, let alone photography for private purposes unrelated to competition such as mapmaking or simple amateur snapshots. See *supra*, at 232.

[7] Our holding here does not reach the issues raised by the Court of Appeals for the Seventh Circuit's holding regarding a "business curtilage" in *United States* v. *Swart*, 679 F. 2d 698 (CA7 1982); that case involved actual physical entry onto the business premises.

JUSTICE POWELL, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, concurring in part, and dissenting in part.

The Fourth Amendment protects private citizens from arbitrary surveillance by their Government. For nearly 20 years, this Court has adhered to a standard that ensured that Fourth Amendment rights would retain their vitality as technology expanded the Government's capacity to commit unsuspected intrusions into private areas and activities. Today, in the context of administrative aerial photography of commercial premises, the Court retreats from that standard. It holds that the photography was not a Fourth Amendment "search" because it was not accompanied by a physical trespass and because the equipment used was not the most highly sophisticated form of technology available to the Government. Under this holding, the existence of an asserted privacy interest apparently will be decided solely by reference to the manner of surveillance used to intrude on that interest. Such an inquiry will not protect Fourth Amendment rights, but rather will permit their gradual decay as technology advances.

I

Since the 1890's, petitioner Dow Chemical Company (Dow) has been manufacturing chemicals at a facility in Midland, Michigan. Its complex covers 2,000 acres and contains a number of chemical process plants. Many of these are "open-air" plants, with reactor equipment, loading and storage facilities, transfer lines, and motors located in the open areas between buildings. Dow claims that the technology used in these plants constitutes confidential business information, and that the design and configuration of the equipment located there reveal details of Dow's secret manufacturing processes.[1]

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[1] The record establishes that Dow used the open-air design primarily for reasons of safety. Dow determined that, if an accident were to occur and hazardous chemicals were inadvertently released, the concentration of toxic

Short of erecting a roof over the Midland complex, Dow has, as the Court states, undertaken "elaborate" precautions to secure the facility from unwelcome intrusions. *Ante*, at 229. In fact, Dow appears to have done everything commercially feasible to protect the confidential business information and property located within the borders of the facility. Security measures include an 8-foot-high chain link fence completely surrounding the facility that is guarded by security personnel and monitored by closed-circuit television, alarm systems that are triggered by unauthorized entry into the facility, motion detectors that indicate movement of persons within restricted areas, a prohibition on use of camera equipment by anyone other than authorized Dow personnel, and a strict policy under which no photographs of the facility may be taken or released without prior management review and approval.[2] In addition to these precautions, the open-air plants were placed within the internal portion of the 2,000-acre complex to conceal them from the view of members of the public outside the perimeter fence.

Dow's security program also includes procedures designed to protect the facility from aerial photography. Dow has instructed its employees that it is "concerned when other than commercial passenger flights pass over the plant property." App. 14. When "suspicious" overflights occur, such as where a plane makes several passes over the facility, employees try to obtain the plane's identification number and de-

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and explosive fumes within enclosed plants would constitute an intolerable risk to employee health and safety. Moreover, as the Court correctly observes, Dow found that the cost of enclosing the facility would be prohibitive. *Ante*, at 229, 236. The record reflects that the cost of roofing just one of the open-air plants would have been approximately $15 million in 1978. The record further shows that enclosing the plants would greatly increase the cost of routine maintenance. App. 74–75.

[2] On these and other security measures protecting the Midland facility, the District Court found that Dow has "spent at least 3.25 million dollars in each of the last ten years" preceding this litigation. 536 F. Supp. 1355, 1365 (ED Mich 1982).

scription. Working with personnel from the State Police and local airports, Dow employees then locate the pilot to determine if he has photographed the facility. If Dow learns that he has done so, Dow takes steps to prevent dissemination of photographs that show details of its proprietary technology.[3]

The controversy underlying this litigation arose out of the efforts of the Environmental Protection Agency (EPA) to check emissions from the power houses located within Dow's Midland complex for violations of federal air quality standards. After making one ground-level inspection with Dow's consent, and obtaining schematic drawings of the power houses from Dow, EPA requested Dow's permission to conduct a second inspection during which EPA proposed to photograph the facility. Dow objected to EPA's decision to take photographs and denied the request. EPA then informed Dow that it was considering obtaining a search warrant to gain entry to the plant. Inexplicably, EPA did not follow that procedure, but instead hired a private firm to take aerial photographs of the facility.

Using a sophisticated aerial mapping camera,[4] this firm took approximately 75 color photographs of various parts of the plant. The District Court found that "some of the photographs taken from directly above the plant at 1,200 feet are capable of enlargement to a scale of 1 inch equals 20 feet *or greater*, without significant loss of detail or resolution. When enlarged in this manner, and viewed under magnification, it is possible to discern equipment, pipes, and power lines as small as ½ inch in diameter." 536 F. Supp. 1355, 1357 (ED Mich. 1982) (emphasis in original). Observation of these minute details is, as the District Court found, "a near physical impossibility" from anywhere "but *directly above*" the complex. *Ibid.* (emphasis in original). Because of the complicated details captured in the photographs, the District Court concluded, "the camera saw a great deal more than the human eye could ever see," even if the observer was located directly above the facility.[5] *Id.*, at 1367.

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[3] When Dow discovers that aerial photographs have been taken, it requests the photographer to turn over the film. Dow then develops the film and reviews the photographs. If the photographs depict private business information, Dow retains them and the negatives. In the event that the photographer refuses to cooperate, Dow commences litigation to protect its trade secrets.

[4] The District Court believed it was "important to an understanding of this case to provide a description of the highly effective equipment used" in photographing Dow's facility. *Id.*, at 1357, n. 2. "The aircraft used was a twin engine Beechcraft," which is "able to 'provide photographic stability, fast mobility and flight endurance required for precision photography.'" *Ibid.* (citation omitted). The camera used "cost in excess of $22,000.00 and is described by the company as the 'finest precision aerial camera available.' . . . The camera was mounted to the floor inside the aircraft and was capable of taking several photographs in precise and rapid succession." *Ibid.* (citation omitted). This technique facilitates stereoscopic examination, a type of examination that permits depth perception.

Several weeks later, Dow learned about the EPA-authorized overflight from an independent source. Dow filed this lawsuit, alleging that the aerial photography was an unreasonable search under the Fourth Amendment and constituted an inspection technique outside the scope of EPA's authority under the Clean Air Act, 42 U. S. C. §§7413, 7414.[6] The District Court upheld Dow's position on both issues and entered a permanent injunction restraining EPA from conducting future aerial surveillance and photography of the Midland facility. The Court of Appeals for the Sixth Circuit reversed. 749 F. 2d 307 (1984). It concluded that, while Dow had a reasonable expectation of privacy with respect to ground-level intrusion into the enclosed buildings within its facility, it did not have such an expectation with respect to aerial observation and photography.[7] The court also held that EPA's use of aerial photography did not exceed its authority under § 114 of the Clean Air Act, 42 U. S. C. § 7414. We granted certiorari to review both of these holdings. 472 U. S. 1007 (1985).

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[5] As the District Court explained, when a person is "flying at 1,200 or 5,000 feet, [his] eye can discern only the basic sizes, shapes, outlines, and colors of the objects below." *Id.*, at 1367. The aerial camera used in this case, on the other hand, "successfully captured vivid images of Dow's plant which EPA could later analyze under enlarged and magnified conditions." *Ibid.*

[6] Dow also claimed that the aerial photography constituted a "taking" of its property without due process of law in violation of the Fifth Amendment. The District Court dismissed that claim without prejudice, and it is not before us.

The Court rejects Dow's constitutional claim on the ground that "the taking of aerial photographs of an industrial plant complex from navigable airspace is not a search prohibited by the Fourth Amendment." *Ante*, at 239.[8] The Court does not explicitly reject application of the reasonable expectation of privacy standard of *Katz* v. *United States*, 389 U. S. 347 (1967), in this context; nor does it explain how its result squares with *Katz* and its progeny. Instead, the Court relies on questionable assertions concerning the manner of the surveillance, and on its conclusion that the Midland facility more closely resembles an "open field" than it does the "curtilage" of a private home. The Court's decision marks a drastic reduction in the Fourth Amendment protections previously afforded to private commercial premises under our decisions. Along with *California* v. *Ciraolo*, *ante*, p. 207, also decided today, the decision may signal a significant retreat from the rationale of prior Fourth Amendment decisions.

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[7] The Court of Appeals' holding rested in part on its erroneous observation that Dow had taken no steps to protect its privacy from aerial intrusions. See 749 F. 2d, at 312–313. Moreover, the court apparently assumed that Dow would have to build some kind of barrier against aerial observation in order to have an actual expectation of privacy from aerial surveillance. *Ibid.* The court did not explain the basis for this assumption or discuss why it disagreed with the District Court's conclusion that commercial overflights posed virtually no risk to Dow's privacy interests.

[8] I agree with the Court's determination that the use of aerial photography as an inspection technique, absent Fourth Amendment constraints, does not exceed the scope of EPA's authority under the Clean Air Act, 42 U. S. C. § 7414(a), and to this extent I join Part III of the Court's opinion.

II

Fourth Amendment protection of privacy interests in business premises "is . . . based upon societal expectations that have deep roots in the history of the Amendment." *Oliver* v. *United States*, 466 U. S. 170, 178, n. 8 (1984). In *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307 (1978), we observed that the "particular offensiveness" of the general warrant and writ of assistance, so despised by the Framers of the Constitution, "was acutely felt by the merchants and businessmen whose premises and products were inspected" under their authority. *Id.*, at 311. Against that history, "it is untenable that the ban on warrantless searches was not intended to shield places of business as well as of residence." *Id.*, at 312. Our precedents therefore leave no doubt that proprietors of commercial premises, including corporations, have the right to conduct their business free from unreasonable official intrusion. See *G. M. Leasing Corp.* v. *United States*, 429 U. S. 338, 353 (1977); *See* v. *City of Seattle*, 387 U. S. 541, 543 (1967).

In the context of administrative inspections of business premises, the Court has recognized an exception to the Fourth Amendment rule that warrantless searches of property not accessible to members of the public are presumptively unreasonable. Since the interest of the owner of commercial property is "in being free from *unreasonable* intrusions onto his property by agents of the government," not in being free from any inspections whatsoever, the Court has held that "the assurance of regularity provided by a warrant may be unnecessary under certain inspection schemes." *Donovan* v. *Dewey*, 452 U. S. 594, 599 (1981) (emphasis in original). Thus, where Congress has made a reasonable determination that a system of warrantless inspections is necessary to enforce its regulatory purpose, and where "the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections," warrantless inspections may be permitted. *Id.*, at 600. This exception does not apply here. The Government does not contend, nor does the Court hold, that the Clean Air Act authorizes a warrantless inspection program that adequately protects the privacy interests of those whose premises are subject to inspection.

Instead, the Court characterizes our decisions in this area simply as giving the Government "'greater latitude to conduct warrantless inspections of commercial property'" because privacy interests in such property differ significantly from privacy interests in the home. *Ante*, at 237 (citation omitted). This reasoning misunderstands the relevant precedents. The exception we have recognized for warrantless inspections, limited to pervasively regulated businesses, see *Donovan* v. *Dewey, supra; United States* v. *Biswell*, 406 U. S. 311 (1972); *Colonnade Catering Corp.* v. *United States*, 397 U. S. 72 (1970), is not founded solely on the differences between the premises occupied by such businesses and homes, or on a conclusion that administrative inspections do not intrude on protected privacy interests and therefore do not implicate Fourth Amendment concerns. Rather, the exception is based on a determination that the reasonable expectation of privacy that the owner of a business does enjoy may be adequately protected by the regulatory scheme itself. *Donovan* v. *Dewey, supra*, at 599. We have never held that warrantless intrusions on commercial property generally are acceptable under the Fourth Amendment. On the contrary, absent a sufficiently defined and regular program of warrantless inspections, the Fourth Amendment's warrant requirement is fully applicable in the commercial context. *Marshall* v. *Barlow's, Inc., supra*, at 312–315, 324; *G. M. Leasing Corp.* v. *United States, supra*, at 358; *See* v. *City of Seattle, supra*, at 543–546.

III

Since our decision in *Katz* v. *United States*, the question whether particular governmental conduct constitutes a

Fourth Amendment "search" has turned on whether that conduct intruded on a constitutionally protected expectation of privacy. *Smith* v. *Maryland,* 442 U. S. 735 (1979); *United States* v. *United States District Court,* 407 U. S. 297 (1972). In the context of governmental inspection of commercial property, the Court has relied on the standard of *Katz* to determine whether an inspection violated the Fourth Amendment rights of the owner of the property. See *Marshall* v. *Barlow's, Inc., supra,* at 313, 315. Today, while purporting to consider the Fourth Amendment question raised here under the rubric of *Katz,* the Court's analysis of the issue ignores the heart of the *Katz* standard.

A

The Court correctly observes that Dow has an expectation of privacy in the buildings located on the Midland property and that society is prepared to recognize that expectation as reasonable. *Ante,* at 236. Similarly, in view of the numerous security measures protecting the entire Dow complex from intrusion on the ground, the Court properly concludes that Dow has a reasonable expectation in being free from such intrusion. *Ante,* at 236–237. Turning to the issue presented in this case, however, the Court erroneously states that the Fourth Amendment protects Dow only from "actual physical entry" by the Government "into any enclosed area." *Ibid.* This statement simply repudiates *Katz.* The reasonable expectation of privacy standard was designed to ensure that the Fourth Amendment continues to protect privacy in an era when official surveillance can be accomplished without any physical penetration of or proximity to the area under inspection. Writing for the Court in *Katz,* Justice Stewart explained that Fourth Amendment protections would mean little in our modern world if the reach of the Amendment "turn[ed] upon the presence or absence of a physical intrusion into any given enclosure." 389 U. S., at 353. Thus, the Court's observation that the aerial photography was not accompanied by a physical trespass is irrelevant to the analysis of the Fourth Amendment issue raised here, just as it was irrelevant in *Katz*. Since physical trespass no longer functions as a reliable proxy for intrusion on privacy, it is necessary to determine if the surveillance, whatever its form, intruded on a reasonable expectation that a certain activity or area would remain private.

B

An expectation of privacy is reasonable for Fourth Amendment purposes if it is rooted in a "source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."[9] *Rakas* v. *Illinois*, 439 U. S. 128, 143–144, n. 12 (1978). Dow argues that, by enacting trade secret laws, society has recognized that it has a legitimate interest in preserving the privacy of the relevant portions of its open-air plants. As long as Dow takes reasonable steps to protect its secrets, the law should enforce its right against theft or disclosure of those secrets.[10]

As discussed above, our cases holding that Fourth Amendment protections extend to business property have expressly relied on our society's historical understanding that owners of such property have a legitimate interest in being free from unreasonable governmental inspection. *Marshall* v. *Barlow's, Inc.*, 436 U. S., at 311–313; see *Oliver* v. *United States*, 466 U. S., at 178, n. 8. Moreover, despite the Court's misconception of the nature of Dow's argument concerning the laws protecting the trade secrets within its open-air plants,[11] Dow plainly is correct to argue that those laws constitute society's express determination that commercial entities have a legitimate interest in the privacy of certain kinds of property. Dow has taken every feasible step to protect information claimed to constitute trade secrets from the public and particularly from its competitors. Accordingly, Dow has a reasonable expectation of privacy in its commercial facility in the sense required by the Fourth Amendment. EPA's conduct in this case intruded on that expectation because the aerial photography captured information that Dow had taken reasonable steps to preserve as private.

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[9] Our decisions often use the words "reasonable" and "legitimate" interchangeably to describe a privacy interest entitled to Fourth Amendment protection. See *California* v. *Ciraolo*, *ante*, at 219–220, n. 4 (POWELL, J., dissenting).

[10] As the District Court observed: "Society has spoken in this area through Congress, the State Legislatures, and the courts. Federal law, under the Trade Secrets Act, 18 U. S. C. § 1905, makes it a crime for government employees to disclose trade secret information. The Clean Air Act itself, in Section 114(c), 42 U. S. C. § 7414(c), addresses this concern for [proprietary] information. Moreover, EPA has adopted regulations providing for protection of trade secrets. 40 CFR 2.201–2.309. Michigan law, in addition to recognizing a tort action, also makes it a crime to appropriate trade secrets, M. C. L. A. § 752.772, as well as to invade one's privacy by means of surveillance. M. C. L. A. §§ 750.539a–539b. These legislative and judicial pronouncements are reflective of a societal acceptance of Dow's privacy expectation as reasonable." 536 F. Supp., at 1367.

C

In this case, the Court does not claim that Dow's expectation of privacy is unreasonable because members of the public fly in airplanes. Whatever the merits of this position in *California* v. *Ciraolo*, *ante*, p. 207, it is inapplicable here, for it is not the case that "[a]ny member of the public flying in this airspace who cared to glance down" could have obtained the information captured by the aerial photography of Dow's facility. *California* v. *Ciraolo*, *ante*, at 213. As the District Court expressly found, the camera used to photograph the facility "saw a great deal more than the human eye could ever see."[12] 536 F. Supp., at 1367. See *supra*, at 242–243, and n. 5. Thus, the possibility of casual observation by passengers on commercial or private aircraft provides no support for the Court's rejection of Dow's privacy interests.

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[11] Contrary to the Court's assertion, Dow does not claim that Fourth Amendment protection of its facility is coextensive with the scope of trade secret statutes. *Ante*, at 232. Rather, Dow argues that the existence of those statutes provides support for its claim that society recognizes commercial privacy interests as reasonable.

The Court nevertheless asserts that Dow has no constitutionally protected privacy interests in its open-air facility because the facility more closely resembles an "open field" than a "curtilage." Of course, the Dow facility resembles neither. The purpose of the curtilage doctrine is to identify the limited outdoor area closely associated with a home. See *Oliver* v. *United States*, *supra*, at 180. The doctrine is irrelevant here since Dow makes no argument that its privacy interests are equivalent to those in the home. Moreover, the curtilage doctrine has never been held to constitute a limit on Fourth Amendment protection. Yet, the Court applies the doctrine, which affords heightened protection to homeowners, in a manner that eviscerates the protection traditionally given to the owner of commercial property. The Court offers no convincing explanation for this application.

Nor does the open field doctrine have a role to play in this case. Open fields, as we held in *Oliver*, are places in which people do not enjoy reasonable expectations of privacy and therefore are open to warrantless inspections from ground and air alike. *Oliver* v. *United States, supra,* at 180–181. Here, the Court concedes that Dow was constitutionally protected against warrantless intrusion by the Government on the ground. The complex bears no resemblance to an open field either in fact or within the meaning of our cases.

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[12] The Court disregards the fact that photographs taken by the sophisticated camera used in this case can be significantly enlarged without loss of acuity. As explained in n. 4, *supra*, the technique used in taking these pictures facilitates stereoscopic examination, which provides the viewer of the photographs with depth perception. Moreover, if the photographs were taken on transparent slides, they could be projected on a large screen. These possibilities illustrate the intrusive nature of aerial surveillance ignored by the Court today. The only Fourth Amendment limitation on such surveillance under today's decision apparently is based on the *means* of surveillance. The Court holds that Dow had no reasonable expectation of privacy from surveillance accomplished by means of a $22,000 mapping camera, but that it does have a reasonable expectation of privacy from satellite surveillance and photography. This type of distinction is heretofore wholly unknown in Fourth Amendment jurisprudence.

The other basis for the Court's judgment—assorted observations concerning the technology used to photograph Dow's plant—is even less convincing. The Court notes that EPA did not use "some unique sensory device that, for example, could penetrate the walls of buildings and record conversations." *Ante,* at 238. Nor did EPA use "satellite technology" or another type of "equipment not generally available to the public." *Ibid.* Instead, as the Court states, the surveillance was accomplished by using "a conventional, albeit precise, commercial camera commonly used in mapmaking." *Ibid.* These observations shed no light on the antecedent question whether Dow had a reasonable expectation of privacy. *Katz* measures Fourth Amendment rights by reference to the privacy interests that a free society recognizes as reasonable, not by reference to the method of surveillance used in the particular case. If the Court's observations were to become the basis of a new Fourth Amendment standard that would replace the rule in *Katz,* privacy rights would be seriously at risk as technological advances become generally disseminated and available in our society.[13]

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[13] With all respect, the Court's purported distinction—for purposes of Fourth Amendment analysis—between degrees of sophistication in surveillance equipment simply cannot be supported in fact or by the reasoning of any prior Fourth Amendment decision of this Court. The camera used by the firm hired by EPA is described by the Court as a "conventional" camera commonly used in mapmaking. *Ante,* at 238. The Court suggests, if not holds, that its decision would have been different if EPA had used "satellite technology" or other equipment not "available to the public." *Ibid.* But the camera used in this case was highly sophisticated in terms of its capability to reveal minute details of Dow's confidential technology and equipment. The District Court found that the photographs revealed details as "small as ½ inch in diameter." See *supra,* at 243. Satel-

IV

I would reverse the decision of the Court of Appeals. EPA's aerial photography penetrated into a private commercial enclave, an area in which society has recognized that privacy interests legitimately may be claimed. The photographs captured highly confidential information that Dow had taken reasonable and objective steps to preserve as private. Since the Clean Air Act does not establish a defined and regular program of warrantless inspections, see *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307 (1978), EPA should have sought a warrant from a neutral judicial officer.[14] The Court's holding that the warrantless photography does not constitute an unreasonable search within the meaning of the Fourth Amendment is based on the absence of any physical trespass—a theory disapproved in a line of cases beginning with the decision in *Katz* v. *United States*. *E. g., United States* v. *United States District Court*, 407 U. S. 297 (1972). These cases have provided a sensitive and reasonable means of preserving interests in privacy cherished by our society. The Court's decision today cannot be reconciled with our precedents or with the purpose of the Fourth Amendment.

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lite photography hardly could have been more informative about Dow's technology. Nor are "members of the public" likely to purchase $22,000 cameras.

[14] Our cases have explained that an administrative agency need not demonstrate "[p]robable cause in the criminal law sense" to obtain a warrant to inspect property for compliance with a regulatory scheme. *Marshall* v. *Barlow's, Inc.*, 436 U. S., at 320. Rather, an administrative warrant may issue "not only on specific evidence of an existing violation but also on a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].'" *Ibid.* (footnote omitted; quoting *Camara* v. *Municipal Court*, 387 U. S. 523, 538 (1967)).

BROCK, SECRETARY OF LABOR *v.* PIERCE COUNTY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85-385. Argued April 1, 1986—Decided May 19, 1986

During the time pertinent to this case, the Comprehensive Employment and Training Act (CETA) (later repealed) required that qualified entities (such as respondent county), receiving federal grants for programs providing job training and employment opportunities for economically disadvantaged, unemployed, or underemployed persons, comply with the statute and the regulations of the Secretary of Labor (Secretary). Section 106(b) of CETA provided that the Secretary shall investigate whenever he has reason to believe, through a complaint, an audit, or otherwise, that a grant recipient was misusing CETA funds, and further provided that the Secretary "shall" determine "the truth of the allegation or belief involved, not later than 120 days after receiving the complaint." Labor Department audits with respect to two grants that respondent had received raised questions concerning respondent's costs related to ineligible employees, and were filed with the Department's Grant Officer, but his final determinations disallowing such costs in each instance were not issued within 120 days after the audit reports were filed. On review of both final determinations, an Administrative Law Judge, although reducing the amount of the disallowance in each case, rejected respondent's contention that the Secretary could not order respondent to repay such sums because the final determination was not issued within the 120-day period and respondent had suffered prejudice because of the delay. The Court of Appeals reversed, holding that § 106(b) prevented the Secretary from acting unless his final determination was made within the 120-day period after the audits were filed.

Held: The Secretary does not lose the power to recover misused CETA funds after expiration of the 120-day period specified in § 106(b). Pp. 258-266.

(a) The mere use of the word "shall" in § 106(b), standing alone, is not enough to remove the Secretary's power to act after 120 days. Every failure of an agency to observe a procedural requirement does not void subsequent agency action, especially when important public rights are at stake. When, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended that the agency lose its power to act. *Mohasco Corp.* v. *Silver*, 447 U. S. 807, distinguished. There is no merit to respondent's contention that statutes setting deadlines for agency action should be interpreted to permit the agency to proceed after the deadline has expired only when agency inaction would prejudice a private citizen seeking some sort of redress, and that when agency inaction will injure only the Federal Treasury, courts should read a command like that of § 106(b) as a statute of limitations or jurisdictional bar. Pp. 258–262.

(b) Nothing in the legislative history suggests that Congress intended to impose a jurisdictional limitation on the Secretary's enforcement powers if he failed to issue a final determination on a complaint or audit within 120 days. Rather, the 120-day provision was clearly intended to spur the Secretary to action in discovering and rectifying abuses of grant recipients, not to limit the scope of his authority. Pp. 262–265.

(c) Nor is there any merit to the contention that the Secretary's regulations established a jurisdictional bar to the Secretary's recovery of funds. The regulations merely provided a timetable for the resolution of complaints and audits. And there is no authority in the statute or legislative history for the courts to create a remedy by treating § 106(b) like a statute of limitations that can vary depending on the complexity of the dispute or the culpability of the grant recipient. Pp. 265–266.

759 F. 2d 1398, reversed.

MARSHALL, J., delivered the opinion for a unanimous Court.

Andrew J. Pincus argued the cause for petitioner. With him on the briefs were *Solicitor General Fried*, *Deputy Solicitor General Geller*, *Allen H. Feldman*, *Mary-Helen Mautner*, and *Steven J. Mandel*.

Joseph F. Quinn argued the cause for respondent. With him on the brief was *William H. Griffies*.*

JUSTICE MARSHALL delivered the opinion of the Court.

Section 106(b) of the Comprehensive Employment and Training Act (CETA), 92 Stat. 1926, 29 U. S. C. § 816(b) (1976 ed., Supp. V), provides that the Secretary of Labor

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*Briefs of *amici curiae* urging affirmance were filed for the St. Regis Mohawk Tribe by *Jeanne S. Whiteing;* for the county of Oakland by *Charles G. Preston;* for the city of Detroit by *David H. Fink* and *Martin A. Scott;* for the city of Chicago by *James D. Montgomery*, *Mary K. Rochford*, and *Maureen Jeannette Kelly;* and for the National Association of Counties et al. by *Benna Ruth Solomon*, *Joyce Holmes Benjamin*, and *James L. Feldesman*.

(Secretary) "shall" issue a final determination as to the misuse of CETA funds by a grant recipient within 120 days after receiving a complaint alleging such misuse. The question presented in this case is whether the Secretary loses the power to recover misused CETA funds after that 120-day period has expired.

I

Before its repeal in 1982,[1] CETA provided for grants of federal funds to certain qualified entities known as "prime sponsors," principally state and local governments, for programs "provid[ing] job training and employment opportunities for economically disadvantaged, unemployed, or underemployed persons," 29 U. S. C. § 801 (1976 ed., Supp. V).[2] The statute contains detailed requirements concerning the operation of a CETA program and the training, pay, and terms of employment of participants in a program, see §§ 823–827. A prime sponsor must submit to the Secretary a plan detailing the operation of the proposed program and containing assurances that the program will comply with the statute and with the Secretary's regulations, § 813.

CETA grants the Secretary broad authority to ensure that CETA funds are used in accordance with the statute and regulations. The Secretary may audit a grant recipient, and in connection with such an audit may inspect records, question employees, and enter any premises upon which the program is conducted. § 835(a)(2). Any interested person, such as a participating employee, may file a complaint with the Secretary alleging that a grant recipient is failing to comply with the applicable standards. § 816.

Section 106(b), 29 U. S. C. § 816(b), which is the provision at issue in this lawsuit, requires that whenever the Secretary has reason to believe, through a complaint, an audit, or otherwise, that any grant recipient is misusing CETA funds or violating any statutory or regulatory standards, the Secretary "shall investigate the matter."[3] The same section goes on to require that the Secretary "shall" determine "the truth of the allegation or belief involved, not later than 120 days after receiving the complaint."

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[1] Effective October 13, 1982, CETA was replaced by the Job Training Partnership Act, Pub. L. 97–300, 96 Stat. 1324 (now codified at 29 U. S. C. § 1501 *et seq.* (1982 ed., and Supp. II)).

[2] Hereafter all citations to Title 29 of the United States Code will be to Supplement V of the 1976 edition, unless otherwise specified.

II

Respondent is a county in the State of Washington that received CETA funds from 1974 through 1977 pursuant to two separate grants. On September 19, 1978, the Labor Department's Office of Special Investigations filed an audit report concerning respondent's first grant. That Department's Grant Officer issued a final determination on February 13, 1981, disallowing approximately $110,000 in costs incurred by respondent on the grounds that those costs related to employees who were not eligible to participate in a CETA program. On December 11, 1978, the Department's Office of the Inspector General filed an audit report with respect to the second grant, again raising questions concerning ineligible participants. On April 22, 1981, the Grant Officer issued a final determination which he corrected on May 22, 1981, finally disallowing $373,000 in costs arising out of the second grant.

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[3] The Secretary has promulgated regulations implementing § 106(b). See 20 CFR §§ 676.86, 676.88 (1982). Those regulations provide that a Labor Department Grant Officer shall receive the complaint or audit report and conduct the investigation. §§ 676.86(c), (d), (e). The Grant Officer then makes an initial determination of the truth of the allegation or belief, § 676.88(a). The Grant Officer must provide the recipient with an opportunity to resolve informally the matters contained in the initial determination, § 676.88(d), and if such informal resolution fails, the Grant Officer issues a final determination, § 676.88(e).

The regulations provide that the Grant Officer's final determination shall be the "final determination" required of the Secretary by § 106(b), even though that determination is subject to further review by an administrative law judge and the Secretary. § 676.86(a). Respondent does not contest the Secretary's interpretation of § 106(b)'s "final determination" requirement. In the present case both the Grant Officer's final determination and the Secretary's final action took place after the 120-day deadline had expired.

Respondent sought review of both final determinations before an Administrative Law Judge (ALJ) of the Labor Department. The ALJ disallowed the smaller sums of $108,000 and $265,000, respectively, in the two cases. In both cases, respondent argued that the Secretary could not order respondent to repay these sums because the Grant Officer's final determination had been issued considerably more than 120 days after submission of the initial audit report. While conceding that the Secretary did not lose jurisdiction to make a determination after 120 days had passed, respondent argued that it had suffered prejudice because of the lengthy delay. The ALJ rejected this claim in both cases, finding no specific instances of prejudice.

The Court of Appeals for the Ninth Circuit reversed. *Pierce County* v. *United States, By and Through Dept. of Labor*, 759 F. 2d 1398 (1985). That court had previously decided, in *City of Edmonds* v. *United States Dept. of Labor*, 749 F. 2d 1419 (1985), that Congress, in enacting § 106(b), had intended to prevent the Secretary from acting on a complaint unless the Secretary's final determination was issued within 120 days from his receipt of the complaint. In the present case, the Court of Appeals decided that the statutory command to the Secretary to issue a final determination "not later than 120 days after receiving the complaint" also required the Secretary to make a determination within 120 days when the allegation or belief is a result of the Secretary's own audit rather than a third-party complaint.[4] This decision conflicts with decisions of the Second, Seventh, and Eighth Circuits.[5] We granted certiorari to resolve the conflict, 474 U. S. 944 (1985), and we now reverse.

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[4] Because § 106(b) states that the deadline for the Secretary's final determination is "120 days after receiving the complaint," the Secretary argued before the Ninth Circuit that the deadline applies only to investigations triggered by third-party complaints, and not those triggered by the Secretary's own audit. This reading, in the Secretary's view, also com-

III

As Judge Friendly noted in a case raising the identical issue, the proposition that Congress intended the Secretary to lose the authority to recover misspent funds 120 days after learning of the misuse "is not, to say the least, of the sort that commands instant assent." *St. Regis Mohawk Tribe, New York* v. *Brock*, 769 F. 2d 37, 41 (CA2 1985) (footnote omitted), cert. pending, No. 85–949. We must therefore examine carefully the statutory language and legislative history to determine whether Congress did indeed desire this somewhat incongruous result.

A

The Ninth Circuit held that the plain meaning of the statutory command that the Secretary "shall" take action within 120 days was sufficient to demonstrate that Congress meant to bar further action after that period had expired. *City of Edmonds*, 749 F. 2d, at 1421. Noting that "[s]tatutory language is generally construed according to the plain meaning of the words used by Congress 'absent a clearly expressed

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ports with the statutory purpose of protecting program participants and other interested parties who may be injured by a prime sponsor's misuse of funds. The Ninth Circuit rejected this argument, in part because the Secretary's own regulations establish a 120-day deadline for issuing determinations after an internal audit, see 20 CFR § 676.88(e) (1982). While the Secretary contends that those regulations simply constitute a self-imposed deadline, he does not challenge this aspect of the Ninth Circuit's decision. We therefore assume without deciding that the 120-day deadline was intended to apply to audit investigations.

[5] *St. Regis Mohawk Tribe, New York* v. *Brock*, 769 F. 2d 37 (CA2 1985), cert. pending, No. 85–949; *Milwaukee County* v. *Donovan*, 771 F. 2d 983 (CA7 1985), cert. pending, No. 85–1109; *City of St. Louis* v. *United States Dept. of Labor*, 787 F. 2d 342 (CA8 1986); but see *Lehigh Valley Manpower Program* v. *Donovan*, 718 F. 2d 99 (CA3 1983) (failure to comply with 120-day provision bars recovery of misspent funds).

legislative intention to the contrary,'" *ibid.* (quoting *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980)), and finding no such contrary legislative intent, the Ninth Circuit held that the 120-day limit was jurisdictional.

The Secretary, however, notes that while § 106(b) speaks in mandatory language, it nowhere specifies the consequences of a failure to make a final determination within 120 days. The Secretary relies on a line of precedent in the Courts of Appeals to the effect that Government agencies do not lose jurisdiction for failure to comply with statutory time limits unless the statute "'*both* expressly requires an agency or public official to act within a particular time period *and* specifies a consequence for failure to comply with the provision.'" *St. Regis Mohawk Tribe, supra,* at 41 (quoting *Fort Worth National Corp.* v. *Federal Savings & Loan Ins. Corp.*, 469 F. 2d 47, 58 (CA5 1972)).[6] Having specified no consequences for the failure to make the determination required by § 106(b) within 120 days, the Secretary argues, the courts should not impute to Congress the desire to remedy such a failure by preventing the Secretary from protecting both the public fisc and the integrity of a Government program.

This Court has never expressly adopted the Circuit precedent upon which the Secretary relies. However, our decisions supply at least the underpinnings of those precedents. This Court has frequently articulated the "great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided." *United States* v. *Nashville, C. & St. L. R. Co.*, 118 U. S. 120, 125 (1886). See also *Guaranty Trust Co.* v. *United States*, 304 U. S. 126 (1938); *Stanley* v. *Schwalby*, 147 U. S. 508, 515 (1893). We would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake. When, as here, there are less drastic remedies available for failure to meet a statutory deadline,[7] courts should not assume that Congress intended the agency to lose its power to act.

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[6] See also *National Cable Television Assn., Inc.* v. *Copyright Royalty Tribunal*, 233 U. S. App. D. C. 44, 57, n. 23, 724 F. 2d 176, 189, n. 23 (1983) (requirement in 17 U. S. C. § 804(e) that tribunal "shall" render decision within one year does not make later decision void); *Marshall* v. *N. L. Industries, Inc.*, 618 F. 2d 1220, 1224–1225 (CA7 1980) (failure to meet requirement in 29 U. S. C. § 660(c)(3) that Secretary of Labor "shall" make determination on employee's complaint within 90 days does not bar subsequent enforcement action); *Marshall* v. *Local Union 1374, Int'l Assn. of Machinists and Aerospace Workers, AFL–CIO*, 558 F. 2d 1354 (CA9 1977) (requirement of 29 U. S. C. § 482(b) that Secretary of Labor "shall" bring suit within 60 days of receiving complaint does not bar later suit).

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[7] The Administrative Procedure Act (APA), 5 U. S. C. §§ 701–706, entitles any person "adversely affected or aggrieved by agency action" to judicial review, § 702, unless the relevant statute precludes judicial review or "agency action is committed to agency discretion by law," § 701(a)(2). Clearly the statutory command that the Secretary "shall" act within 120 days does not commit such action to the Secretary's discretion. Moreover, nothing in CETA appears to bar an action to enforce the 120-day deadline. Cf. *CETA Workers Organizing Comm.* v. *City of New York*, 617 F. 2d 926, 934–936 (CA2 1980) (APA may not be used to circumvent § 106(b) complaint mechanism). Thus, it would appear that a complainant adversely affected by the Secretary's failure to act on a complaint could bring an action in the district court. The court would have the authority to "compel agency action unlawfully withheld or unreasonably delayed," § 706(1). If respondent is correct in arguing that Congress, in enacting § 106(b), intended to protect grant recipients from lengthy delays in audits, grant recipients such as respondent would be within the zone of interests protected by § 106(b), and would therefore have standing to bring an action under the APA to the same extent as a complainant. Cf. *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U. S. 150, 153 (1970). On the other hand, were § 106(b) intended only to protect complainants, there would be no need to provide grant recipients with any remedy at all—much less the drastic remedy respondent seeks in this case—for the Secretary's failure to meet the 120-day deadline.

The Ninth Circuit rejected the *Fort Worth National* line of precedent as being inconsistent with this Court's decision in *Mohasco Corp.* v. *Silver*, 447 U. S. 807 (1980). In *Mohasco*, we held that an action filed by a private plaintiff after the expiration of the 300-day time period provided in § 706(e) of the Civil Rights Act of 1964, 42 U. S. C. § 2000e–5(e), was jurisdictionally barred. In so holding, we gave controlling weight to the literal meaning of the statutory provisions, which stated that "a charge under this section shall be filed" within the specified time limits. See 447 U. S., at 815–817. However, there are two clear differences between the present case and *Mohasco*. First, legislatures routinely create statutes of limitations for the filing of complaints, and Congress' intention to create a statute of limitations in § 706(e) was certainly unexceptional. Indeed, the plaintiff in *Mohasco* nowhere alleged that § 706(e) was not a statute of limitations, but rather contended that the word "filed" should be defined in a way that would render his action timely. 447 U. S., at 818. Section 106(b), by contrast, does not merely command the Secretary to file a complaint within a specified time, but requires him to resolve the entire dispute within that time. This is a more substantial task than filing a complaint, and the Secretary's ability to complete it within 120 days is subject to factors beyond his control. There is less reason, therefore, to believe that Congress intended such drastic consequences to follow from the Secretary's failure to meet the 120-day deadline. Second, *Mohasco* involved a private right of action, and the plaintiff's failure to file a complaint prejudiced only that plaintiff. In the present case, by contrast, public rights are at stake, and the Secretary's delay, under respondent's theory, would prejudice the rights of the taxpaying public.

Respondent suggests that statutes setting deadlines for agency action should be interpreted to permit the agency to proceed after the deadline has expired only when agency inaction would prejudice a private citizen seeking some sort of redress. When, as in this case, agency inaction will injure only the Federal Treasury, courts should read a command like that of § 106(b) as a statute of limitations or jurisdictional bar. We disagree with this argument for two reasons. First, the protection of the public fisc is a matter that is of interest to every citizen, and we have no evidence that Congress wanted to permit the Secretary's inaction to harm that interest any more than it would permit such inaction to injure an individual claimant. Second, the 120-day deadline clearly applies to investigations triggered by private complaints alleging that the individual complainant, perhaps a program participant or subcontractor, has been injured by a grant recipient's failure to comply with CETA's requirements. Indeed, the federal courts have uniformly held that the statutory complaint mechanism is the sole means of redress for a private party injured by a grant recipient's violation of CETA.[8] Thus, even under respondent's theory, § 106(b) cannot be jurisdictional, because it would then permit the Secretary's inaction to prejudice individual complainants seeking to enforce their rights under CETA. We hold, therefore, that the mere use of the word "shall" in § 106(b), standing alone, is not enough to remove the Secretary's power to act after 120 days.[9]

B

Looking to other sources of congressional intent, we have found nothing in the history of the 1978 amendments to CETA, which added the 120-day deadline, to suggest that Congress intended to impose a jurisdictional limitation on agency action. The only explicit discussion of the jurisdictional effect of the 120-day provision was a brief colloquy on the House floor between Representative Hawkins, one of the bill's sponsors, and Representative Obey, who offered the amendment that added the 120-day deadline:

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[8] See *Uniformed Firefighters Assn., Local 94, IAFF, AFL–CIO* v. *City of New York*, 676 F. 2d 20 (CA2 1982); *Kolman* v. *Milwaukee Area Technical College*, 548 F. Supp. 684 (ED Wis. 1982).

[9] We need not, and do not, hold that a statutory deadline for agency action can never bar later action unless that consequence is stated explicitly in the statute. In this case, we need not go beyond the normal indicia of congressional intent to conclude that § 106(b) permits the Secretary to recover misspent funds after the 120-day deadline has expired.

> "Mr. HAWKINS. Mr. Chairman, we have seen the amendment. We accept the amendment.
>
> "If the gentleman would further yield, do I understand . . . that if the determination is not made in a specified time it shall not affect the Secretary's jurisdiction in the matter?
>
> "Mr. OBEY. That is correct.
>
> "Mr. HAWKINS. With that understanding we do accept the amendment." 124 Cong. Rec. 25230–25231 (1978).

Such statements by individual legislators should not be given controlling effect, but when they are consistent with the statutory language and other legislative history, they provide evidence of Congress' intent. *Grove City College* v. *Bell*, 465 U. S. 555, 567 (1984). In this case, the legislative history fully supports Representative Hawkins' interpretation of § 106(b).

One of the principal concerns underlying the 1978 amendments was the growing incidence of fraud and misuse of CETA funds by state and local governments. See H. R. Rep. No. 95–1124, pp. 3, 5, 13 (1978) (noting "widespread concern that there has been substantial fraud and abuse in the CETA program and insufficient staff devoted to monitoring and supervising the program"); S. Rep. No. 95–891, pp. 42–44 (1978). A primary purpose of the amendments was to strengthen the Secretary's hand in dealing with illegal practices. Thus the amendments contained numerous antifraud measures, including a provision for criminal sanctions, 18 U. S. C. § 665(a) (1976 ed., Supp. V), bonding requirements for grant recipients, 29 U. S. C. § 836, and authorization for the Secretary to terminate or suspend funding or to take other corrective measures, § 816. In a separate bill, Congress created an Office of the Inspector General in the Labor Department. See Inspector General Act of 1978, Pub. L. 95–452, 92 Stat. 1101 (now codified as amended at 5 U. S. C. App. §§ 1–12. The Conference Report for the 1978 CETA amendments made it clear that Congress expected the Secretary "to provide, within the new Office of Inspector General, for a unit whose sole responsibility will be that of monitoring the CETA program." H. R. Conf. Rep. No. 95–1765, p. 123 (1978).

Congress was particularly concerned about the ability of program participants such as contractors, subgrantees, and employees to voice grievances and receive a prompt resolution. See *St. Regis Mohawk Tribe, New York* v. *Brock*, 769 F. 2d, at 43 (citing House and Senate hearings on 1978 amendments). The Senate noted that "[i]n some cases grievances have been either ignored, or there has been interminable delay in their resolution." S. Rep. No. 95–891, *supra*, at 42. In response to this problem, Congress required, in § 106(a), that each prime sponsor establish a grievance procedure that would provide for hearings and require a decision within 60 days after the filing of the grievance. After exhausting the prime sponsor's grievance machinery, an interested party could, pursuant to § 106(b), file a complaint with the Secretary. The legislative history makes it clear that Congress intended the 120-day deadline of § 106(b) to assure program participants the opportunity for a prompt resolution of grievances. Senate Report No. 95–891, *supra*, at 16, for example, states: "A party who wishes to appeal to the Secretary either the formal or the informal decision of the prime sponsor has the right to a due process hearing and a determination on the merits of the case within 120 days." Conspicuously absent is any reference to the possibility that the 120-day provision might convey rights upon the prime sponsor.

There is no indication in the legislative history that Congress was concerned that the Secretary was treating prime sponsors too harshly; to the contrary, the House and Senate Reports consistently voice Congress' belief that the Secretary had not been aggressive enough in discovering and rectifying abuses. The 120-day provision was clearly intended to spur the Secretary to action, not to limit the scope of his authority. Congress intended that "the Secretary should have maximum authority to protect the integrity of the program." S. Rep. No. 95–891, *supra*, at 21. It would be very odd if Congress had implemented that intent by cutting off the Secretary's authority to correct abuses just 120 days after learning of them.

C

Respondent provides additional arguments, which we find unpersuasive, in support of the Ninth Circuit's decision. Respondent contends that even if the statute does not establish a jurisdictional bar to the Secretary's recovery of funds, the Secretary's own regulations do so. The Secretary's regulations, however, merely provide a timetable for the resolution of complaints and audits. See n. 3, *supra*. While they arguably go beyond the statute in applying the 120-day limit to investigations triggered by audits as well as those triggered by complaints, they do not specify any consequences of a failure to meet that deadline in the event of either an audit or a complaint. Thus, even if it were possible for the Secretary to create a jurisdictional limitation not contained in the statute, the language of the regulations cannot support respondent's contention that the 120-day provision is jurisdictional with respect to audits.

Respondent urges, if we do not find § 106(b) to affect the Secretary's jurisdiction, that we treat it like a statute of limitations that can vary depending on the complexity of the dispute or the culpability of the grant recipient. There is simply no authority in the statute or legislative history for the courts to create such a remedy. The balancing of interests that respondent proposes is a task for Congress.

IV

We hold that CETA's requirement that the Secretary "shall" take action within 120 days does not, standing alone, divest the Secretary of jurisdiction to act after that time. There is simply no indication in the statute or its legislative history that Congress intended to remove the Secretary's enforcement powers if he fails to issue a final determination on a complaint or audit within 120 days. Accordingly, the judgment of the Court of Appeals is

Reversed.

WYGANT ET AL. *v.* JACKSON BOARD OF EDUCATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 84–1340. Argued November 6, 1985—Decided May 19, 1986

The collective-bargaining agreement between respondent Board of Education (Board) and a teachers' union provided that if it became necessary to lay off teachers, those with the most seniority would be retained, except that at no time would there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff. After this layoff provision was upheld in litigation arising from the Board's noncompliance with the provision, the Board adhered to it, with the result that, during certain school years, nonminority teachers were laid off, while minority teachers with less seniority were retained. Petitioners, displaced nonminority teachers, brought suit in Federal District Court, alleging violations of the Equal Protection Clause and certain federal and state statutes. Dismissing the suit on cross-motions for summary judgment, the District Court upheld the constitutionality of the layoff provision, holding that the racial preferences granted by the Board need not be grounded on a finding of prior discrimination but were permissible under the Equal Protection Clause as an attempt to remedy societal discrimination by providing "role models" for minority schoolchildren. The Court of Appeals affirmed.

Held: The judgment is reversed.

746 F. 2d 1152, reversed.

JUSTICE POWELL, joined by THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR, concluded that the layoff provision violates the Equal Protection Clause. Pp. 273–278.

(a) In the context of affirmative action, racial classifications must be justified by a compelling state purpose, and the means chosen by the State to effectuate that purpose must be narrowly tailored. Pp. 273–274.

(b) Societal discrimination alone is insufficient to justify a racial classification. Rather, there must be convincing evidence of prior discrimination by the governmental unit involved before allowing limited use of racial classifications to remedy such discrimination. The "role model" theory employed by the District Court would allow the Board to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose. Moreover, it does not bear any relationship to the harm caused by prior discriminatory hiring practices. Societal discrimination, without more, is too amorphous a basis for finding race-conscious state action and for imposing a racially classified remedy. Pp. 274–276.

(c) If the purpose of the layoff provision was to remedy prior discrimination as the Board claims, such purpose to be constitutionally valid would require the District Court to make a factual determination that the Board had a strong basis in evidence for its conclusion that remedial action was necessary. No such finding has ever been made. Pp. 277–278.

JUSTICE POWELL, joined by THE CHIEF JUSTICE and JUSTICE REHNQUIST, concluded that as a means of accomplishing purposes that otherwise may be legitimate, the layoff provision is not sufficiently narrowly tailored. Other, less intrusive means of accomplishing similar purposes—such as the adoption of hiring goals—are available. Pp. 279–284.

JUSTICE WHITE concluded that respondent Board of Education's layoff policy has the same effect and is equally violative of the Equal Protection Clause as integrating a work force by discharging whites and hiring blacks until the latter comprise a suitable percentage of the work force. Pp. 294–295.

JUSTICE O'CONNOR concluded that the layoff provision is not "narrowly tailored" to achieve its asserted remedial purpose because it acts to maintain levels of minority hiring set by a hiring goal that has no relation to the remedying of employment discrimination. Pp. 293–294.

POWELL, J., announced the judgment of the Court and delivered an opinion, in which BURGER, C. J., and REHNQUIST, J., joined, and in all but Part IV of which O'CONNOR, J., joined. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 284. WHITE, J., filed an opinion concurring in the judgment, *post*, p. 294. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, *post*, p. 295. STEVENS, J., filed a dissenting opinion, *post*, p. 313.

K. Preston Oade, Jr., argued the cause for petitioners. With him on the briefs were *Constance E. Brooks* and *Thomas Rasmussen*.

Jerome A. Susskind argued the cause and filed a brief for respondents.*

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Acting Solicitor General Fried, Assistant Attorney General Reynolds, Deputy Assistant Attorney General Cooper, Samuel A. Alito, Jr., Walter W. Barnett*, and *David K. Flynn;* for the American Federation of Teach-

JUSTICE POWELL announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE and JUSTICE REHNQUIST join, and in all but Part IV of which JUSTICE O'CONNOR joins.

This case presents the question whether a school board, consistent with the Equal Protection Clause, may extend

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ers, AFL–CIO, by *Bruce A. Miller* and *Stuart M. Israel;* for the Anti-Defamation League of B'nai B'rith by *Robert A. Helman, Michele Odorizzi, Daniel M. Harris, Justin J. Finger, Meyer Eisenberg,* and *Jeffrey P. Sinensky;* for Local 36, International Association of Firefighters, AFL–CIO, et al. by *George H. Cohen;* for the Mid-America Legal Foundation by *John M. Cannon, Susan W. Wanat,* and *Ann Plunkett Sheldon;* and for the Pacific Legal Foundation by *Ronald A. Zumbrum* and *John H. Findley.*

Briefs of *amici curiae* urging affirmance were filed for the State of Minnesota et al. by *Hubert H. Humphrey III,* Attorney General of Minnesota, *John R. Tunheim,* Assistant Attorney General, and *Peter M. Ackerberg* and *Jean Boler,* Special Assistant Attorneys General, *John K. Van de Kamp,* Attorney General of California, *William J. Guste, Jr.,* Attorney General of Louisiana, *Robert M. Spire,* Attorney General of Nebraska, *Paul Bardacke,* Attorney General of New Mexico, and *Bronson C. La Follette,* Attorney General of Wisconsin; for the Affirmative Action Coordinating Center et al. by *Jeanny Mirer, Jules Lobel, Frank E. Deale,* and *Anne Simon;* for the Congressional Coalition by *Morgan D. Hodgson, Richard Ruda,* and *Linda C. Kauskay;* for the Greater Boston Civil Rights Coalition by *John Reinstein, Marjorie Heins,* and *Mark A. Michelson;* for the Jackson Education Association by *James A. White;* for the Lawyers' Committee for Civil Rights Under Law et al. by *Walter A. Smith, Jr., R. Claire Guthrie, James Robertson, Harold R. Tyler, Jr., Norman Redlich, Thomas D. Barr, William L. Robinson, Richard T. Seymour, Norman J. Chachkin, Robert Allen Sedler,* and *Burt Neuborne;* for the Mexican American Legal Defense and Educational Fund by *Allen M. Katz, Antonia Hernandez,* and *John E. Huerta;* for the Michigan Civil Rights Commission et al. by *Frank J. Kelley,* Attorney General of Michigan, *Louis J. Caruso,* Solicitor General, and *Felix E. League, Howard E. Golberg,* and *Dianne Rubin,* Assistant Attorneys General; for the National Association for the Advancement of Colored People by *Grover G. Hankins;* for the NAACP Legal Defense and Educational Fund, Inc., by *Julius LeVonne Chambers, Ronald L. Ellis,* and *Eric Schnapper;* for the National Education Association et al. by *Robert H. Chanin;* and for the preferential protection against layoffs to some of its employees because of their race or national origin.

I

In 1972 the Jackson Board of Education, because of racial tension in the community that extended to its schools, considered adding a layoff provision to the Collective Bargaining Agreement (CBA) between the Board and the Jackson Education Association (Union) that would protect employees who were members of certain minority groups against layoffs.[1] The Board and the Union eventually approved a new provision, Article XII of the CBA, covering layoffs. It stated:

> "In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff. In no event will the number given notice of possible layoff be greater than the number of positions to be eliminated. Each teacher so affected will be called back in reverse order for posi-

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National School Boards Association by *Gwendolyn H. Gregory*, *August W. Steinhilber*, and *Thomas A. Shannon*.

Briefs of *amici curiae* were filed for the city of Detroit by *Daniel B. Edelman;* for the Equal Employment Advisory Council by *Robert E. Williams*, *Douglas S. McDowell*, and *Thomas R. Bagby;* for the Michigan State Police Troopers Association, Inc., by *Donald L. Reisig* and *Lawrence P. Schneider;* and for the National Board, YMCA of the USA, et al. by *Judith Lichtman*.

[1] Prior to bargaining on this subject, the Minority Affairs Office of the Jackson Public Schools sent a questionnaire to all teachers, soliciting their views as to a layoff policy. The questionnaire proposed two alternatives: continuation of the existing straight seniority system, or a freeze of minority layoffs to ensure retention of minority teachers in exact proportion to the minority student population. Ninety-six percent of the teachers who responded to the questionnaire expressed a preference for the straight seniority system.

> tions for which he is certificated maintaining the above minority balance." App. 13.[2]

When layoffs became necessary in 1974, it was evident that adherence to the CBA would result in the layoff of tenured nonminority teachers while minority teachers on probationary status were retained. Rather than complying with Article XII, the Board retained the tenured teachers and laid off probationary minority teachers, thus failing to maintain the percentage of minority personnel that existed at the time of the layoff. The Union, together with two minority teachers who had been laid off, brought suit in federal court, *id.*, at 30 (*Jackson Education Assn.* v. *Board of Education (Jackson I)* (mem. op.)), claiming that the Board's failure to adhere to the layoff provision violated the Equal Protection Clause of the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964. They also urged the District Court to take pendent jurisdiction over state-law contract claims. In its answer the Board denied any prior employment discrimination and argued that the layoff provision conflicted with the Michigan Teacher Tenure Act. App. 33. Following trial, the District Court *sua sponte* concluded that it lacked jurisdiction over the case, in part because there was insufficient evidence to support the plaintiffs' claim that the Board had engaged in discriminatory hiring practices prior to 1972, *id.*, at 35–37, and in part because the plaintiffs had not fulfilled the jurisdictional prerequisite to a Title VII claim by filing discrimination charges with the Equal Employment Opportunity Commission. After dismissing the federal claims, the District Court declined to exercise pendent jurisdiction over the state-law contract claims.

Rather than taking an appeal, the plaintiffs instituted a suit in state court, *Jackson Education Assn.* v. *Board of*

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[2] Article VII of the CBA defined "minority group personnel" as "those employees who are Black, American Indian, Oriental, or of Spanish descendancy." App. 15.

Education, No. 77-011484CZ (Jackson Cty. Cir. Ct. 1979) *(Jackson II)*, raising in essence the same claims that had been raised in *Jackson I*. In entering judgment for the plaintiffs, the state court found that the Board had breached its contract with the plaintiffs, and that Article XII did not violate the Michigan Teacher Tenure Act. In rejecting the Board's argument that the layoff provision violated the Civil Rights Act of 1964, the state court found that it "ha[d] not been established that the board had discriminated against minorities in its hiring practices. The minority representation on the faculty was the result of societal racial discrimination." App. 43. The state court also found that "[t]here is no history of overt past discrimination by the parties to this contract." *Id.*, at 49. Nevertheless, the court held that Article XII was permissible, despite its discriminatory effect on nonminority teachers, as an attempt to remedy the effects of societal discrimination.

After *Jackson II*, the Board adhered to Article XII. As a result, during the 1976–1977 and 1981–1982 school years, nonminority teachers were laid off, while minority teachers with less seniority were retained. The displaced nonminority teachers, petitioners here, brought suit in Federal District Court, alleging violations of the Equal Protection Clause, Title VII, 42 U. S. C. § 1983, and other federal and state statutes. On cross-motions for summary judgment, the District Court dismissed all of petitioners' claims. 546 F. Supp. 1195 (ED Mich. 1982). With respect to the equal protection claim,[3] the District Court held that the racial preferences granted by the Board need not be grounded on a finding of prior discrimination. Instead, the court decided that the racial preferences were permissible under the Equal Protection Clause as an attempt to remedy societal discrimination by providing "role models" for minority schoolchildren, and upheld the constitutionality of the layoff provision.

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[3] Petitioners have sought review in this Court only of their claim based on the Equal Protection Clause.

The Court of Appeals for the Sixth Circuit affirmed, largely adopting the reasoning and language of the District Court. 746 F. 2d 1152 (1984). We granted certiorari, 471 U. S. 1014 (1985), to resolve the important issue of the constitutionality of race-based layoffs by public employers. We now reverse.

II

Petitioners' central claim is that they were laid off because of their race in violation of the Equal Protection Clause of the Fourteenth Amendment. Decisions by faculties and administrators of public schools based on race or ethnic origin are reviewable under the Fourteenth Amendment.[4] This Court has "consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality,'" *Loving* v. *Virginia*, 388 U. S. 1, 11 (1967), quoting *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943). "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *University of California Regents* v. *Bakke*, 438 U. S. 265, 291 (1978) (opinion of POWELL, J., joined by WHITE, J.).

The Court has recognized that the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination. *Mississippi University for Women* v. *Hogan*, 458 U. S. 718, 724, n. 9 (1982); *Bakke*, *supra*, at 291–299; see *Shelley* v. *Kraemer*, 334 U. S. 1, 22 (1948); see also A. Bickel, The Morality of Consent 133 (1975). In this case, Article XII of the CBA operates against whites and in favor of certain minorities, and therefore constitutes a classification based on race. "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." *Fullilove* v. *Klutznick*, 448 U. S. 448, 491 (1980) (opinion of BURGER, C. J.). There are two prongs to this examination. First, any racial classification "must be justified by a compelling governmental interest." *Palmore* v. *Sidoti*, 466 U. S. 429, 432 (1984); see *Loving* v. *Virginia*, *supra*, at 11; cf. *Graham* v. *Richardson*, 403 U. S. 365, 375 (1971) (alienage). Second, the means chosen by the State to effectuate its purpose must be "narrowly tailored to the achievement of that goal." *Fullilove*, *supra*, at 480. We must decide whether the layoff provision is supported by a compelling state purpose and whether the means chosen to accomplish that purpose are narrowly tailored.

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[4] School district collective-bargaining agreements constitute state action for purposes of the Fourteenth Amendment. *Abood* v. *Detroit Board of Ed.*, 431 U. S. 209, 218, and n. 12 (1977).

III

A

The Court of Appeals, relying on the reasoning and language of the District Court's opinion, held that the Board's interest in providing minority role models for its minority students, as an attempt to alleviate the effects of societal discrimination, was sufficiently important to justify the racial classification embodied in the layoff provision. 746 F. 2d, at 1156–1157. The court discerned a need for more minority faculty role models by finding that the percentage of minority teachers was less than the percentage of minority students. *Id.*, at 1156.

This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination. This Court's reasoning in *Hazelwood School District* v. *United States*, 433 U. S. 299 (1977), illustrates that the relevant analysis in cases involving proof of discrimination by statistical disparity focuses on those disparities that demonstrate such prior governmental discrimination. In *Hazelwood* the Court concluded that, absent employment discrimination by the school board, "'nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.'" *Id.*, at 307, quoting *Teamsters* v. *United States*, 431 U. S. 324, 340, n. 20 (1977). See also 746 F. 2d, at 1160 (Wellford, J., concurring) ("Had the plaintiffs in this case presented data as to the percentage of qualified minority teachers in the relevant labor market to show that defendant Board's hiring of black teachers over a number of years had equalled that figure, I believe this court may well have been required to reverse . . ."). Based on that reasoning, the Court in *Hazelwood* held that the proper comparison for determining the existence of actual discrimination by the school board was "between the racial composition of [the school's] teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market." 433 U. S., at 308. *Hazelwood* demonstrates this Court's focus on prior discrimination as the justification for, and the limitation on, a State's adoption of race-based remedies. See also *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971).

Unlike the analysis in *Hazelwood*, the role model theory employed by the District Court has no logical stopping point. The role model theory allows the Board to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose. Indeed, by tying the required percentage of minority teachers to the percentage of minority students, it requires just the sort of year-to-year calibration the Court stated was unnecessary in *Swann*, 402 U. S., at 31–32:

> "At some point these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown I*. . . . Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition

> of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system."

See also *id.*, at 24.

Moreover, because the role model theory does not necessarily bear a relationship to the harm caused by prior discriminatory hiring practices, it actually could be used to escape the obligation to remedy such practices by justifying the small percentage of black teachers by reference to the small percentage of black students. See *United States* v. *Hazelwood School District*, 392 F. Supp. 1276, 1286–1287 (ED Mo. 1975), rev'd, 534 F. 2d 805 (CA8 1976), rev'd and remanded, 433 U. S. 299 (1977). Carried to its logical extreme, the idea that black students are better off with black teachers could lead to the very system the Court rejected in *Brown* v. *Board of Education*, 347 U. S. 483 (1954) *(Brown I)*.

Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. The role model theory announced by the District Court and the resultant holding typify this indefiniteness. There are numerous explanations for a disparity between the percentage of minority students and the percentage of minority faculty, many of them completely unrelated to discrimination of any kind. In fact, there is no apparent connection between the two groups. Nevertheless, the District Court combined irrelevant comparisons between these two groups with an indisputable statement that there has been societal discrimination, and upheld state action predicated upon racial classifications. No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and overexpansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.

B

Respondents also now argue that their purpose in adopting the layoff provision was to remedy prior discrimination against minorities by the Jackson School District in hiring teachers. Public schools, like other public employers, operate under two interrelated constitutional duties. They are under a clear command from this Court, starting with *Brown* v. *Board of Education*, 349 U. S. 294 (1955), to eliminate every vestige of racial segregation and discrimination in the schools. Pursuant to that goal, race-conscious remedial action may be necessary. *North Carolina State Board of Education* v. *Swann*, 402 U. S. 43, 46 (1971). On the other hand, public employers, including public schools, also must act in accordance with a "core purpose of the Fourteenth Amendment" which is to "do away with all governmentally imposed discriminations based on race." *Palmore* v. *Sidoti*, 466 U. S., at 432. These related constitutional duties are not always harmonious; reconciling them requires public employers to act with extraordinary care. In particular, a public employer like the Board must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination.

Evidentiary support for the conclusion that remedial action is warranted becomes crucial when the remedial program is challenged in court by nonminority employees. In this case, for example, petitioners contended at trial that the remedial program—Article XII—had the purpose and effect of instituting a racial classification that was not justified by a remedial purpose. 546 F. Supp., at 1199. In such a case, the trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary. The ultimate burden remains with the employees to demonstrate the unconstitutionality of an affirmative-action program. But unless such a determination is made, an appellate court reviewing a challenge by nonminority employees to remedial action cannot determine whether the race-based action is justified as a remedy for prior discrimination.

Despite the fact that Article XII has spawned years of litigation and three separate lawsuits, no such determination ever has been made. Although its litigation position was different, the Board in *Jackson I* and *Jackson II* denied the existence of prior discriminatory hiring practices. App. 33. This precise issue was litigated in both those suits. Both courts concluded that any statistical disparities were the result of general societal discrimination, not of prior discrimination by the Board. The Board now contends that, given another opportunity, it could establish the existence of prior discrimination. Although this argument seems belated at this point in the proceedings, we need not consider the question since we conclude below that the layoff provision was not a legally appropriate means of achieving even a compelling purpose.[5]

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[5] JUSTICE MARSHALL contends that "the plurality has too quickly assumed the absence of a legitimate factual predicate . . . for affirmative action in the Jackson schools," *post*, at 297. In support of that assertion, he engages in an unprecedented reliance on nonrecord documents that respondent has "lodged" with this Court. This selective citation to factual materials not considered by the District Court or the Court of Appeals below is unusual enough by itself. My disagreement with JUSTICE MARSHALL, however, is more fundamental than any disagreement over the heretofore unquestioned rule that this Court decides cases based on the record before it. JUSTICE MARSHALL does not define what he means by "legitimate factual predicate," nor does he demonstrate the relationship of these nonrecord materials to his undefined predicate. If, for example, his dissent assumes that general societal discrimination is a sufficient factual predicate, then there is no need to refer to respondents' lodgings as to its own employment history. No one disputes that there has been race discrimination in this country. If that fact alone can justify race-conscious action by the State, despite the Equal Protection Clause, then the dissent need not rely on nonrecord materials to show a "legitimate factual predi-

IV

The Court of Appeals examined the means chosen to accomplish the Board's race-conscious purposes under a test of "reasonableness." That standard has no support in the decisions of this Court. As demonstrated in Part II above, our decisions always have employed a more stringent standard—however articulated—to test the validity of the means chosen by a State to accomplish its race-conscious purposes. See, *e. g., Palmore, supra,* at 432 ("[T]o pass constitutional muster, [racial classifications] must be 'necessary . . . to the accomplishment' of their legitimate purpose") (quoting *McLaughlin* v. *Florida,* 379 U. S. 184, 196 (1964)); *Fullilove,* 448 U. S., at 480 (opinion of BURGER, C. J.) ("We recognize the need for careful judicial evaluation to assure that any . . . program that employs racial or ethnic criteria to accomplish

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cate." If, on the other hand, JUSTICE MARSHALL is assuming that the necessary factual predicate is prior discrimination by the Board, there is no escaping the need for a factual determination below—a determination that does not exist.

The real dispute, then, is not over the state of the record. It is disagreement as to what constitutes a "legitimate factual predicate." If the necessary factual predicate is *prior discrimination*—that is, that race-based state action is taken to remedy prior discrimination by the governmental unit involved—then the very nature of appellate review requires that a factfinder determine whether the employer was justified in instituting a remedial plan. Nor can respondents unilaterally insulate themselves from this key constitutional question by conceding that they have discriminated in the past, now that it is in their interest to make such a concession. Contrary to the dissent's assertion, the requirement of such a determination by the trial court is not some arbitrary barrier set up by today's opinion. Rather, it is a necessary result of the requirement that race-based state action be remedial.

At any rate, much of the material relied on by JUSTICE MARSHALL has been the subject of the previous lawsuit in *Jackson II,* where the court concluded that it "had not been established that the board had discriminated against minorities in its hiring practices." App. 43. Moreover, as noted *supra,* at 271, in *Jackson I* the Board expressly denied that it had engaged in employment discrimination.

the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal").[6] Under strict scrutiny the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose. *Fullilove*, 448 U. S., at 480 (opinion of BURGER, C. J.).[7] "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Id.*, at 537 (STEVENS, J., dissenting).

We have recognized, however, that in order to remedy the effects of prior discrimination, it may be necessary to take race into account. As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy. "When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible." *Id.*, at 484, quoting *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 777 (1976).[8] In *Fullilove*, the challenged

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[6] The term "narrowly tailored," so frequently used in our cases, has acquired a secondary meaning. More specifically, as commentators have indicated, the term may be used to require consideration of whether lawful alternative and less restrictive means could have been used. Or, as Professor Ely has noted, the classification at issue must "fit" with greater precision than any alternative means. Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. Chi. L. Rev. 723, 727, n. 26 (1974). "[Courts] should give particularly intense scrutiny to whether a nonracial approach or a more narrowly-tailored racial classification could promote the substantial interest about as well and at tolerable administrative expense." Greenawalt, Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions, 75 Colum. L. Rev. 559, 578–579 (1975).

[7] Several commentators have emphasized that, no matter what the weight of the asserted governmental purpose, the *means* chosen to accomplish the purpose should be narrowly tailored. In arguing for a form of intermediate scrutiny, Professor Greenawalt contends that, "while benign racial classifications call for some weighing of the importance of ends they call for even more intense scrutiny of means, especially of the administrability of less onerous alternative classifications." Greenawalt, *supra*, at 565. Professor Ely has suggested that "special scrutiny in the suspect classification context has in fact consisted not in weighing ends but rather in insisting that the classification in issue fit a constitutionally permissible state goal with greater precision than any available alternative." Ely, *supra*, at 727, n. 26. Professor Gunther argues that judicial scrutiny of legislative means is more appropriate than judicial weighing of the importance of the legislative purpose. Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection, 86 Harv. L. Rev. 1, 20–21 (1972).

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[8] Of course, when a State implements a race-based plan that requires such a sharing of the burden, it cannot justify the discriminatory effect on some individuals because other individuals had approved the plan. Any "waiver" of the right not to be dealt with by the government on the basis of one's race must be made by those affected. Yet JUSTICE MARSHALL repeatedly contends that the fact that Article XII was approved by a majority vote of the Union somehow validates this plan. He sees this case not in terms of individual constitutional rights, but as an allocation of burdens "between two racial groups." *Post*, at 309. Thus, Article XII becomes a political compromise that "avoided placing the entire burden of layoffs on either the white teachers as a group or the minority teachers as a group." *Post*, at 299. But the petitioners before us today are not "the white teachers as a group." They are Wendy Wygant and other individuals who claim that they were fired from their jobs because of their race. That claim cannot be waived by petitioners' more senior colleagues. In view of the way union seniority works, it is not surprising that while a straight freeze on minority layoffs was overwhelmingly rejected, a "compromise" eventually was reached that placed the entire burden of the compromise on the most junior union members. The more senior union members simply had nothing to lose from such a compromise. See *ibid.* ("To petitioners, at the bottom of the seniority scale among white teachers, fell the lot of bearing the white group's proportionate share of layoffs that became necessary in 1982.") The fact that such a painless accommodation was approved by the more senior union members six times since 1972 is irrelevant. The Constitution does not allocate constitutional rights to be distributed like bloc grants within discrete racial groups; and until it does, petitioners' more senior union colleagues cannot vote away petitioners' rights.

JUSTICE MARSHALL also attempts to portray the layoff plan as one that has no real invidious effect, stating that "within the confines of constant minority proportions, it preserves the hierarchy of seniority in the selection of individuals for layoff." *Post*, at 309. That phrase merely expresses the tautology that layoffs are based on seniority except as to those nonminority teachers who are displaced by minority teachers with less seniority. This is really nothing more than group-based analysis: "[E]ach statute required at least 10 percent of federal public works funds to be used in contracts with minority-owned business enterprises. This requirement was found to be within the remedial powers of Congress in part because the "actual 'burden' shouldered by nonminority firms is relatively light." 448 U. S., at 484.[9]

Significantly, none of the cases discussed above involved layoffs.[10] Here, by contrast, the means chosen to achieve the Board's asserted purposes is that of laying off nonminority teachers with greater seniority in order to retain minority teachers with less seniority. We have previously expressed concern over the burden that a preferential-layoffs scheme imposes on innocent parties. See *Firefighters* v. *Stotts*, 467 U. S. 561, 574–576, 578–579 (1984); see also *Steelworkers* v. *Weber*, 443 U. S. 193, 208 (1979) ("The plan does not require the discharge of white workers and their replacement with new black hirees"). In cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. De-

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group would shoulder a portion of [the layoff] burden equal to its portion of the faculty." *Post*, at 299. The constitutional problem remains: the decision that petitioners would be laid off was based on their race.

[9] Similarly, the Court approved the hiring program in *Steelworkers* v. *Weber*, 443 U. S. 193, 208 (1979), in part because the plan did not "unnecessarily trammel the interests of the white employees." Since *Weber* involved a private company, its reasoning concerning the validity of the hiring plan at issue there is not directly relevant to this case, which involves a state-imposed plan. No equal protection claim was presented in *Weber*.

[10] There are cases involving alteration of strict seniority layoffs, see, *e. g., Ford Motor Co.* v. *Huffman*, 345 U. S. 330 (1953); *Aeronautical Industrial District Lodge 727* v. *Campbell*, 337 U. S. 521 (1949), but they do not involve the critical element here—layoffs based on race. The Constitution does not require layoffs to be based on strict seniority. But it does require the State to meet a heavy burden of justification when it implements a layoff plan based on race.

nial of a future employment opportunity is not as intrusive as loss of an existing job.

Many of our cases involve union seniority plans with employees who are typically heavily dependent on wages for their day-to-day living. Even a temporary layoff may have adverse financial as well as psychological effects. A worker may invest many productive years in one job and one city with the expectation of earning the stability and security of seniority. "At that point, the rights and expectations surrounding seniority make up what is probably the most valuable capital asset that the worker 'owns,' worth even more than the current equity in his home." Fallon & Weiler, Conflicting Models of Racial Justice, 1984 S. Ct. Rev. 1, 58. Layoffs disrupt these settled expectations in a way that general hiring goals do not.

While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities,[11] layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive. We therefore hold that, as a means of accomplishing purposes that otherwise may be legitimate, the Board's layoff plan is not sufficiently narrowly tailored.[12] Other, less intrusive means of accomplishing similar purposes—such as the adoption of hiring goals—are available. For these reasons, the Board's selection of layoffs as the means to accomplish even a valid purpose cannot satisfy the demands of the Equal Protection Clause.[13]

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[11] The "school admission" cases, which involve the same basic concepts as cases involving hiring goals, illustrate this principle. For example, in *DeFunis* v. *Odegaard*, 416 U. S. 312 (1974), while petitioner's complaint alleged that he had been denied admission to the University of Washington Law School because of his race, he also had been accepted at the Oregon, Idaho, Gonzaga, and Willamette Law Schools. *DeFunis* v. *Odegaard*, 82 Wash. 2d 11, 30, n. 11, 507 P. 2d 1169, 1181, n. 11 (1973). The injury to DeFunis was not of the same kind or degree as the injury that he would have suffered had he been removed from law school in his third year. Even this analogy may not rise to the level of harm suffered by a union member who is laid off.

[12] We have recognized, however, that in order to provide make-whole relief to the actual, identified victims of individual discrimination, a court may in an appropriate case award competitive seniority. See *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (1976).

V

We accordingly reverse the judgment of the Court of Appeals for the Sixth Circuit.

It is so ordered.

JUSTICE O'CONNOR, concurring in part and concurring in the judgment.

This case requires us to define and apply the standard required by the Equal Protection Clause when a governmental agency agrees to give preferences on the basis of race or national origin in making layoffs of employees. The specific question posed is, as JUSTICE MARSHALL puts it, "whether the Constitution prohibits a union and a local school board from developing a collective-bargaining agreement that apportions layoffs between two racially determined groups as a means of preserving the effects of an affirmative hiring policy." *Post*, at 300 (dissenting). There is no issue here of the interpretation and application of Title VII of the Civil Rights Act of 1964; accordingly, we have only the constitutional issue to resolve.

The Equal Protection Clause standard applicable to racial classifications that work to the disadvantage of "nonminorities" has been articulated in various ways. See, *e. g.*, *post*, at 301–302 (MARSHALL, J., dissenting). JUSTICE POW-

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[13] The Board's definition of minority to include blacks, Orientals, American Indians, and persons of Spanish descent, n. 2, *supra*, further illustrates the undifferentiated nature of the plan. There is no explanation of why the Board chose to favor these particular minorities or how in fact members of some of the categories can be identified. Moreover, respondents have never suggested—much less formally found—that they have engaged in prior, purposeful discrimination against members of each of these minority groups.

ELL now would require that: (1) the racial classification be justified by a "'compelling governmental interest,'" and (2) the means chosen by the State to effectuate its purpose be "narrowly tailored." *Ante*, at 274. This standard reflects the belief, apparently held by all Members of this Court, that racial classifications of any sort must be subjected to "strict scrutiny," however defined. See, *e. g.*, *Fullilove* v. *Klutznick*, 448 U. S. 448, 491 (1980) (opinion of BURGER, C. J., joined by WHITE, J.) ("Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees"); *id.*, at 537 (STEVENS, J., dissenting) ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification"); *University of California Regents* v. *Bakke*, 438 U. S. 265, 291 (1978) (opinion of POWELL, J., joined by WHITE, J.) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination"); *id.*, at 361–362 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.) ("[O]ur review under the Fourteenth Amendment should be strict—not '"strict" in theory and fatal in fact,' because it is stigma that causes fatality—but strict and searching nonetheless"). JUSTICES MARSHALL, BRENNAN, and BLACKMUN, however, seem to adhere to the formulation of the "strict" standard that they authored, with JUSTICE WHITE, in *Bakke:* "remedial use of race is permissible if it serves 'important governmental objectives' and is 'substantially related to achievement of those objectives.'" *Post*, at 301–302 (MARSHALL, J., dissenting), quoting *Bakke*, *supra*, at 359 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.).

I subscribe to JUSTICE POWELL's formulation because it mirrors the standard we have consistently applied in examining racial classifications in other contexts. In my view,

> "the analysis and level of scrutiny applied to determine the validity of [a racial] classification do not vary simply

> because the objective appears acceptable to individual Members of the Court. While the validity and importance of the objective may affect the outcome of the analysis, the analysis itself does not change." *Mississippi University for Women* v. *Hogan*, 458 U. S. 718, 724, n. 9 (1982).

Although JUSTICE POWELL's formulation may be viewed as more stringent than that suggested by JUSTICES BRENNAN, WHITE, MARSHALL, and BLACKMUN, the disparities between the two tests do not preclude a fair measure of consensus. In particular, as regards certain state interests commonly relied upon in formulating affirmative action programs, the distinction between a "compelling" and an "important" governmental purpose may be a negligible one. The Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program. This remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required. See *infra*, at 289–293; *ante*, at 277–278. See also *post*, at 305 (MARSHALL, J., dissenting). Additionally, although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently "compelling," at least in the context of higher education, to support the use of racial considerations in furthering that interest. See, *e. g.*, *Bakke*, *supra*, at 311–315 (opinion of POWELL, J.). See also *post*, at 306 (MARSHALL, J., dissenting); *post*, at 315–317 (STEVENS, J., dissenting). And certainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently "important" or "compelling" to sustain the use of affirmative action policies.

It appears, then, that the true source of disagreement on the Court lies not so much in defining the state interests which may support affirmative action efforts as in defining the degree to which the means employed must "fit" the ends pursued to meet constitutional standards. See, *e. g., ante,* at 280, nn. 6, 7. Yet even here the Court has forged a degree of unanimity; it is agreed that a plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently "narrowly tailored," or "substantially related," to the correction of prior discrimination by the state actor. See *infra,* at 289; *ante,* at 277–278; *post,* at 305 (MARSHALL, J., dissenting).

In the final analysis, the diverse formulations and the number of separate writings put forth by various Members of the Court in these difficult cases do not necessarily reflect an intractable fragmentation in opinion with respect to certain core principles. Ultimately, the Court is at least in accord in believing that a public employer, consistent with the Constitution, may undertake an affirmative action program which is designed to further a legitimate remedial purpose and which implements that purpose by means that do not impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals directly and adversely affected by a plan's racial preference.

Respondent School Board argues that the governmental purpose or goal advanced here was the School Board's desire to correct apparent prior employment discrimination against minorities while avoiding further litigation. See, *e. g.,* Brief for Respondents 15–17. See also Defendant's Brief in Support of Motion for Summary Judgment and Motion to Dismiss in No. Civ. 81–8173249 (ED Mich.), p. 16 (hereinafter cited as Defendant's Summary Judgment Brief). The Michigan Civil Rights Commission determined that the evidence before it supported the allegations of discrimination on the part of the Jackson School Board, though that determination was never reduced to formal findings because the School Board, with the agreement of the Jackson Education Association (Union), voluntarily chose to remedy the perceived violation. Among the measures the School Board and the Union eventually agreed were necessary to remedy the apparent prior discrimination was the layoff provision challenged here; they reasoned that without the layoff provision, the remedial gains made under the ongoing hiring goals contained in the collective bargaining agreement could be eviscerated by layoffs.

The District Court and the Court of Appeals did not focus on the School Board's unquestionably compelling interest in remedying its apparent prior discrimination when evaluating the constitutionality of the challenged layoff provision. Instead, both courts reasoned that the goals of remedying "societal discrimination" and providing "role models" were sufficiently important to withstand equal protection scrutiny. I agree with the plurality that a governmental agency's interest in remedying "societal" discrimination, that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny. See *ante*, at 276. See also *Bakke*, 438 U. S., at 307 (opinion of POWELL, J.). I also concur in the plurality's assessment that use by the courts below of a "role model" theory to justify the conclusion that this plan had a legitimate remedial purpose was in error.* See *ante*, at 275–276. Thus, in my view, the District Court and the Court of Appeals clearly erred in relying on these purposes and in failing to give greater attention to the School

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*The goal of providing "role models" discussed by the courts below should not be confused with the very different goal of promoting racial diversity among the faculty. Because this latter goal was not urged as such in support of the layoff provision before the District Court and the Court of Appeals, however, I do not believe it necessary to discuss the magnitude of that interest or its applicability in this case. The only governmental interests at issue here are those of remedying "societal" discrimination, providing "role models," and remedying apparent prior employment discrimination by the School Board.

Board's asserted purpose of rectifying its own apparent discrimination.

The error of the District Court and the Court of Appeals can be explained by reference to the fact that the primary issue argued by the parties on the cross motions for summary judgment was whether the School Board, a court, or another competent body had to have made a finding of past discrimination before or at the time of the institution of the plan in order for the plan to be upheld as remedial in purpose. 546 F. Supp. 1195, 1199–1200 (ED Mich. 1982). See also Brief in Support of Plaintiff's Motion for Summary Judgment and Opposition to Defendant's Motion for Summary Judgment in No. Civ. 81–8173249 (ED Mich.), pp. 5–13; Defendant's Summary Judgment Brief 11–15. The courts below ruled that a particularized, contemporaneous finding of discrimination was not necessary and upheld the plan as a remedy for "societal" discrimination, apparently on the assumption that in the absence of a specific, contemporaneous finding, any discrimination addressed by an affirmative action plan could only be termed "societal." See, *e. g.*, 546 F. Supp., at 1199. I believe that this assumption is false and therefore agree with the plurality that a contemporaneous or antecedent finding of past discrimination by a court or other competent body is not a constitutional prerequisite to a public employer's voluntary agreement to an affirmative action plan. See *ante*, at 277–278.

A violation of federal statutory or constitutional requirements does not arise with the making of a finding; it arises when the wrong is committed. Contemporaneous findings serve solely as a means by which it can be made absolutely certain that the governmental actor truly is attempting to remedy its own unlawful conduct when it adopts an affirmative action plan, rather than attempting to alleviate the wrongs suffered through general societal discrimination. See, *e. g.*, *Fullilove* v. *Klutznick*, 448 U. S., at 498 (POWELL, J., concurring). Such findings, when voluntarily made by a public employer, obviously are desirable in that they provide evidentiary safeguards of value both to nonminority employees and to the public employer itself, should its affirmative action program be challenged in court. If contemporaneous findings were *required* of public employers in every case as a precondition to the constitutional validity of their affirmative action efforts, however, the relative value of these evidentiary advantages would diminish, for they could be secured only by the sacrifice of other vitally important values.

The imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations. See, *e. g.*, *Bakke*, *supra*, at 364 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.). Cf. *Steelworkers* v. *Weber*, 443 U. S. 193, 210–211 (1979) (BLACKMUN, J., concurring). This result would clearly be at odds with this Court's and Congress' consistent emphasis on "the value of voluntary efforts to further the objectives of the law." *Bakke*, *supra*, at 364 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.); see also *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 417–418 (1975); *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 44 (1974). The value of voluntary compliance is doubly important when it is a public employer that acts, both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of unique importance. See S. Rep. No. 92–415, p. 10 (1971) (accompanying the amendments extending coverage of Title VII to the States) ("Discrimination by government . . . serves a doubly destructive purpose. The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in that particular community, but also creates mistrust, alienation, and all too often hostility toward the entire process of government").

Imposing a contemporaneous findings requirement would produce the anomalous result that what private employers may voluntarily do to correct apparent violations of Title VII, *Steelworkers* v. *Weber*, *supra*, public employers are constitutionally forbidden to do to correct their statutory and constitutional transgressions.

Such results cannot, in my view, be justified by reference to the incremental value a contemporaneous findings requirement would have as an evidentiary safeguard. As is illustrated by this case, public employers are trapped between the competing hazards of liability to minorities if affirmative action *is not* taken to remedy apparent employment discrimination and liability to nonminorities if affirmative action *is* taken. Where these employers, who are presumably fully aware both of their duty under federal law to respect the rights of *all* their employees and of their potential liability for failing to do so, act on the basis of information which gives them a sufficient basis for concluding that remedial action is necessary, a contemporaneous findings requirement should not be necessary.

This conclusion is consistent with our previous decisions recognizing the States' ability to take voluntary race-conscious action to achieve compliance with the law even in the absence of a specific finding of past discrimination. See, *e. g.*, *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U. S. 144, 165–166 (1977) (reapportionment); *McDaniel* v. *Barresi*, 402 U. S. 39 (1971) (school desegregation). Indeed, our recognition of the responsible state actor's competency to take these steps is assumed in our recognition of the States' constitutional *duty* to take affirmative steps to eliminate the continuing effects of past unconstitutional discrimination. See, *e. g.*, *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 15 (1971); *Green* v. *New Kent County School Board*, 391 U. S. 430, 437–438 (1968).

Of course, as JUSTICE POWELL notes, the public employer must discharge this sensitive duty with great care; in order to provide some measure of protection to the interests of its nonminority employees and the employer itself in the event that its affirmative action plan is challenged, the public employer must have a firm basis for determining that affirmative action is warranted. Public employers are not without reliable benchmarks in making this determination. For example, demonstrable evidence of a disparity between the percentage of qualified blacks on a school's teaching staff and the percentage of qualified minorities in the relevant labor pool sufficient to support a prima facie Title VII pattern or practice claim by minority teachers would lend a compelling basis for a competent authority such as the School Board to conclude that implementation of a voluntary affirmative action plan is appropriate to remedy apparent prior employment discrimination.

To be sure, such a conclusion is not unassailable. If a voluntary affirmative action plan is subsequently challenged in court by nonminority employees, those employees must be given the opportunity to prove that the plan does not meet the constitutional standard this Court has articulated. However, as the plurality suggests, the institution of such a challenge does not automatically impose upon the public employer the burden of convincing the court of its liability for prior unlawful discrimination; nor does it mean that the court must make an actual finding of prior discrimination based on the employer's proof before the employer's affirmative action plan will be upheld. See *ante*, at 277–278. In "reverse discrimination" suits, as in any other suit, it is the plaintiffs who must bear the burden of demonstrating that their rights have been violated. The findings a court must make before upholding an affirmative action plan reflect this allocation of proof and the nature of the challenge asserted. For instance, in the example posed above, the nonminority teachers could easily demonstrate that the purpose and effect of the plan is to impose a race-based classification. But when the Board introduces its statistical proof as evidence of its remedial purpose, thereby supplying the court with the means for determining that the Board had a firm basis for concluding that remedial action was appropriate, it is incumbent upon the nonminority teachers to prove their case; they continue to bear the ultimate burden of persuading the court that the Board's evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently "narrowly tailored." Only by meeting this burden could the plaintiffs establish a violation of their constitutional rights, and thereby defeat the presumption that the Board's assertedly remedial action based on the statistical evidence was justified.

In sum, I do not think that the layoff provision was constitutionally infirm simply because the School Board, the Commission, or a court had not made particularized findings of discrimination at the time the provision was agreed upon. But when the plan was challenged, the District Court and the Court of Appeals did not make the proper inquiry into the legitimacy of the Board's asserted remedial purpose; instead, they relied upon governmental purposes that we have deemed insufficient to withstand strict scrutiny, and therefore failed to isolate a sufficiently important governmental purpose that could support the challenged provision.

There is, however, no need to inquire whether the provision actually had a legitimate remedial purpose based on the record, such as it is, because the judgment is vulnerable on yet another ground: the courts below applied a "reasonableness" test in evaluating the relationship between the ends pursued and the means employed to achieve them that is plainly incorrect under any of the standards articulated by this Court. Nor is it necessary, in my view, to resolve the troubling questions whether any layoff provision could survive strict scrutiny or whether this particular layoff provision could, when considered without reference to the hiring goal it was intended to further, pass the onerous "narrowly tailored" requirement. Petitioners have met their burden of establishing that this layoff provision is not "narrowly tailored" to achieve its asserted remedial purpose by demonstrating that the provision is keyed to a hiring goal that itself has no relation to the remedying of employment discrimination.

Although the constitutionality of the hiring goal as such is not before us, it is impossible to evaluate the necessity of the layoff provision as a remedy for the apparent prior employment discrimination absent reference to that goal. See, *e. g.*, *post*, at 306 (MARSHALL, J., dissenting). In this case, the hiring goal that the layoff provision was designed to safeguard was tied to the percentage of minority students in the school district, not to the percentage of qualified minority teachers within the relevant labor pool. The disparity between the percentage of minorities on the teaching staff and the percentage of minorities in the student body is not probative of employment discrimination; it is only when it is established that the availability of minorities in the relevant labor pool substantially exceeded those hired that one may draw an inference of deliberate discrimination in employment. See *Hazelwood School District* v. *United States*, 433 U. S. 299, 308 (1977) (Title VII context). Because the layoff provision here acts to maintain levels of minority hiring that have no relation to remedying employment discrimination, it cannot be adjudged "narrowly tailored" to effectuate its asserted remedial purpose.

I therefore join in Parts I, II, III, and V of the plurality's opinion, and concur in the judgment.

JUSTICE WHITE, concurring in the judgment.

The School Board's policy when layoffs are necessary is to maintain a certain proportion of minority teachers. This policy requires laying off nonminority teachers solely on the basis of their race, including teachers with seniority, and retaining other teachers solely because they are black, even though some of them are in probationary status. None of the interests asserted by the Board, singly or together, justify this racially discriminatory layoff policy and save it from the strictures of the Equal Protection Clause. Whatever the legitimacy of hiring goals or quotas may be, the discharge of white teachers to make room for blacks, none of whom has been shown to be a victim of any racial discrimination, is quite a different matter. I cannot believe that in order to integrate a work force, it would be permissible to discharge whites and hire blacks until the latter comprised a suitable percentage of the work force. None of our cases suggest that this would be permissible under the Equal Protection Clause. Indeed, our cases look quite the other way. The layoff policy in this case—laying off whites who would otherwise be retained in order to keep blacks on the job—has the same effect and is equally violative of the Equal Protection Clause. I agree with the plurality that this official policy is unconstitutional and hence concur in the judgment.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, dissenting.

When this Court seeks to resolve far-ranging constitutional issues, it must be especially careful to ground its analysis firmly in the facts of the particular controversy before it. Yet in this significant case, we are hindered by a record that is informal and incomplete. Both parties now appear to realize that the record is inadequate to inform the Court's decision. Both have lodged with the Court voluminous "submissions" containing factual material that was not considered by the District Court or the Court of Appeals. Petitioners have submitted 21 separate items, predominantly statistical charts, which they assert are relevant to their claim of discrimination. Respondents have submitted public documents that tend to substantiate the facts alleged in the brief accompanying their motion for summary judgment in the District Court. These include transcripts and exhibits from two prior proceedings, in which certain questions of discrimination in the Jackson schools were litigated, *Jackson Education Assn.* v. *Board of Education,* No. 4–72340 (ED Mich. 1976) *(Jackson I),* and *Jackson Education Assn.* v. *Board of Education,* No. 77–011484CZ (Jackson Cty. Cir. Ct. 1979) *(Jackson II).*

We should not acquiesce in the parties' attempt to try their case before this Court. Yet it would be just as serious a mistake simply to ignore altogether, as the plurality has done, the compelling factual setting in which this case evidently has arisen. No race-conscious provision that purports to serve a remedial purpose can be fairly assessed in a vacuum.

The haste with which the District Court granted summary judgment to respondents, without seeking to develop the factual allegations contained in respondents' brief, prevented the full exploration of the facts that are now critical to resolution of the important issue before us. Respondents' acquiescence in a premature victory in the District Court should not now be used as an instrument of their defeat. Rather, the District Court should have the opportunity to develop a factual record adequate to resolve the serious issue raised by the case. I believe, therefore, that it is improper for this Court to resolve the constitutional issue in its current posture. But, because I feel that the plurality has also erred seriously in its legal analysis of the merits of this case, I write further to express my disagreement with the conclusions that it has reached.

I, too, believe that layoffs are unfair. But unfairness ought not be confused with constitutional injury. Paying no heed to the true circumstances of petitioners' plight, the plurality would nullify years of negotiation and compromise designed to solve serious educational problems in the public schools of Jackson, Michigan. Because I believe that a public employer, with the full agreement of its employees, should be permitted to preserve the benefits of a legitimate and constitutional affirmative-action hiring plan even while reducing its work force, I dissent.

I

The record and extrarecord materials that we have before us persuasively suggest that the plurality has too quickly assumed the absence of a legitimate factual predicate, even under the plurality's own view, for affirmative action in the Jackson schools. The first black teacher in the Jackson public schools was hired in 1954.[1] In 1969, when minority representation on the faculty had risen only to 3.9%, the Jackson branch of the NAACP filed a complaint with the Michigan Civil Rights Commission, alleging that the Board had engaged in various discriminatory practices, including racial discrimination in the hiring of teachers. Respondents' Lodging No. 6 (complaint). The Commission conducted an investigation and concluded that each of the allegations had merit.[2]

In settlement of the complaint, the Commission issued an order of adjustment, under which the Jackson Board of Education (Board) agreed to numerous measures designed to improve educational opportunities for black public-school students. Among them was a promise to "[t]ake affirmative steps to recruit, hire and promote minority group teachers and counselors as positions bec[a]me available . . . ." Respondents' Lodging No. 1–B, p. 3. As a result of the Board's efforts to comply with the order over the next two years, the percentage of minority teachers increased to 8.8%.

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[1] Unless otherwise indicated, the historical facts herein recited have been taken from the defendants' brief in support of its motion for summary judgment before the District Court, Record, Doc. No. 4, pp. 1–6.

[2] The Commission concluded: "Racial tension continues to be a part of the entire Jackson School System from the elementary level through high school. It would appear, therefore, that each of the allegations as stated in the complaint can be substantiated based upon organizational records, court files, school records, special committee reports and the appraisal conducted by the Superintendent of Schools." Respondents' Lodging No. 1–B, p. 11 (order of adjustment). This conclusion is supported by extrarecord materials suggesting that the shortage of minority teachers was the result of past discrimination in teacher hiring. For example, the then-Superintendent of Schools testified that "an administrator . . . told me she had tried to get a position in Jackson in the early 1950's and was told that they didn't hire colored people." This was the "type of thing," he stated, that led to adoption of Article XII. Respondents' Lodging No. 3, pp. 22–23.

In 1971, however, faculty layoffs became necessary. The contract in effect at that time, between the Board and the Jackson Education Association (Union), provided that layoffs would be made in reverse order of seniority. Because of the recent vintage of the school system's efforts to hire minorities, the seniority scheme led to the layoff of a substantial number of minority teachers, "literally wip[ing] out all the gain" made toward achieving racial balance. Respondents' Lodging No. 3, p. 24 (deposition of Superintendent of Schools). Once again, minority teachers on the faculty were a rarity.

By early 1972, when racial tensions in the schools had escalated to violent levels, school officials determined that the best course was full integration of the school system, including integration of the faculty. But they recognized that, without some modification of the seniority layoff system, genuine faculty integration could not take place. See App. 41; Respondents' Lodging No. 3, p. 69 (deposition of Superintendent of Schools); Respondents' Lodging No. 2, pp. 16–20 (testimony of Union Executive Director, *Jackson I*). The Minority Affairs Office of the Jackson Public Schools submitted a questionnaire to all teachers, asking them to consider the possibility of abandoning the "last hired, first fired" approach to layoffs in favor of an absolute freeze on layoffs of minority teachers. The teachers overwhelmingly voted in favor of retaining the straight seniority system. Negotiations ensued between the two camps—on the one hand, the Board, which favored a freeze of minority layoffs and, on the other, the Union, urging straight seniority—and the negotiators ultimately reached accord. One Union leader characterized the development of the layoff compromise as the most difficult balancing of equities that he had ever encountered. Record, Doc. No. 4, p. 5.

The compromise avoided placing the entire burden of layoffs on either the white teachers as a group or the minority teachers as a group. Instead, each group would shoulder a portion of that burden equal to its portion of the faculty. Thus, the overall percentage of minorities on the faculty would remain constant. Within each group, seniority would govern which individuals would be laid off. This compromise was the provision at issue here, subsequently known as Article XII:

> "In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff. . . . Each teacher so affected will be called back in reverse order for positions for which he is certified maintaining the above minority balance." App. 13.

The Board and the Union leadership agreed to the adoption of Article XII. The compromise was then presented to the teachers, who ratified it by majority vote. Each of the six times that the contract has been renegotiated, Article XII has been presented for reconsideration to the members of the Union, at least 80% of whom are white, and each time it has been ratified.

To petitioners, at the bottom of the seniority scale among white teachers, fell the lot of bearing the white group's proportionate share of layoffs that became necessary in 1982. Claiming a right not to lose their jobs ahead of minority teachers with less seniority, petitioners brought this challenge to Article XII under the Equal Protection Clause of the Fourteenth Amendment.

II

From the outset, it is useful to bear in mind what this case is not. There has been no court order to achieve racial balance, which might require us to reflect upon the existence of judicial power to impose obligations on parties not proved to have committed a wrong. See *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 16 (1971). There is also no occasion here to resolve whether a white worker may be required to give up his or her job in order to be replaced by a black worker. See *Steelworkers* v. *Weber*, 443 U. S. 193, 208 (1979). Nor are we asked to order parties to suffer the consequences of an agreement that they had no role in adopting. See *Firefighters* v. *Stotts*, 467 U. S. 561, 575 (1984). Moreover, this is not a case in which a party to a collective-bargaining agreement has attempted unilaterally to achieve racial balance by refusing to comply with a contractual, seniority-based layoff provision. Cf. *Teamsters* v. *United States*, 431 U. S. 324, 350, 352 (1977).

The sole question posed by this case is whether the Constitution prohibits a union and a local school board from developing a collective-bargaining agreement that apportions layoffs between two racially determined groups as a means of preserving the effects of an affirmative hiring policy, the constitutionality of which is unchallenged.[3]

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[3] JUSTICE O'CONNOR rests her disposition of this case on the propriety of the hiring plan, even though petitioners have not challenged it. She appears to rely on language in the preamble to the collective-bargaining agreement, which suggests that the "goal of such [affirmative-action] policy shall be to have at least the same percentage of minority racial representation on each individual staff as is represented by the student population of the Jackson Public Schools." Article VII.D.1, App. to Pet. for Cert. 1a. Believing that the school system's hiring "goal" ought instead to be the percentage of qualified minorities in the labor pool, JUSTICE O'CONNOR concludes that the challenged layoff provision itself is overly broad. *Ante*, at 294. Among the materials considered by the District Court and Court of Appeals, however, there is no evidence to show the actual proportion of minority teachers in the Jackson schools, either in relation to

III

Agreement upon a means for applying the Equal Protection Clause to an affirmative-action program has eluded this Court every time the issue has come before us. In *University of California Regents* v. *Bakke*, 438 U. S. 265 (1978), four Members of the Court concluded that, while racial distinctions are irrelevant to nearly all legitimate state objectives and are properly subjected to the most rigorous judicial scrutiny in most instances, they are highly relevant to the one legitimate state objective of eliminating the pernicious vestiges of past discrimination; when that is the goal, a less exacting standard of review is appropriate. We explained at length our view that, because no fundamental right was involved and because whites have none of the immutable characteristics of a suspect class, the so-called "strict scrutiny" applied to cases involving either fundamental rights or suspect classifications was not applicable. *Id.*, at 357 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.). Nevertheless, we eschewed the least rigorous, "rational basis" standard of review, recognizing that any racial classification is subject to misuse. We determined that remedial use of race is permissible if it serves "important govern-

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the qualified minority labor force or in relation to the number of minority students. If the distinction between the two goals is to be considered critical to the constitutionality of the affirmative-action plan, it is incumbent on petitioners—plaintiffs below—to demonstrate that, at the time they were laid off, the proportion of minority teachers had equaled or exceeded the appropriate percentage of the minority labor force, and that continued adherence to affirmative-action goals, therefore, unjustifiably caused their injuries. This petitioners have failed to do. Outside of the First Amendment context, I know of no justification for invalidating a provision because it might, in a hypothetical case, apply improperly to other potential plaintiffs. Petitioners have attempted to fill the gap in their case by supplying statistical charts to this Court. See, *e. g.*, Petitioners' Lodging, pp. 56–62. Clearly, however, we are not equipped for such factfinding, and if the hortatory ceiling of the affirmative-action plan is indeed to be considered a significant aspect of the case, then that would be an appropriate subject of inquiry on remand.

mental objectives" and is "substantially related to achievement of those objectives." *Id.*, at 359; see also *id.*, at 387 (opinion of MARSHALL, J.); *id.*, at 402 (opinion of BLACKMUN, J.). This standard is genuinely a "strict and searching" judicial inquiry, but is "not '"strict" in theory and fatal in fact.'" *Id.*, at 362 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.) (quoting Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972)). The only other Justice to reach the constitutional issue in *Bakke* suggested that, remedial purpose or no, any racial distinctions "call for the most exacting judicial examination." *Id.*, at 291 (opinion of POWELL, J.).

In *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980), the Court again disagreed as to the proper standard of review. Three Justices, of whom I was one, concluded that a statute reserving 10% of federal funds for minority contractors served important governmental objectives and was substantially related to achievement of those objectives, surviving attack under our *Bakke* test. 448 U. S., at 519 (MARSHALL, J., joined by BRENNAN and BLACKMUN, JJ., concurring in judgment). Three other Justices expressly declined to adopt any standard of review, deciding that the provision survived judicial scrutiny under either of the formulae articulated in *Bakke*. 448 U. S., at 492 (opinion of BURGER, C. J., joined by WHITE and POWELL, JJ.).

Despite the Court's inability to agree on a route, we have reached a common destination in sustaining affirmative action against constitutional attack. In *Bakke*, we determined that a state institution may take race into account as a factor in its decisions, 438 U. S., at 326, and in *Fullilove*, the Court upheld a congressional preference for minority contractors because the measure was legitimately designed to ameliorate the present effects of past discrimination, 448 U. S., at 520.

In this case, it should not matter which test the Court applies. What is most important, under any approach to the constitutional analysis, is that a reviewing court genuinely consider the circumstances of the provision at issue. The history and application of Article XII, assuming verification upon a proper record, demonstrate that this provision would pass constitutional muster, no matter which standard the Court should adopt.

IV

The principal state purpose supporting Article XII is the need to preserve the levels of faculty integration achieved through the affirmative hiring policy adopted in the early 1970's. Brief for Respondents 41–43. Justification for the hiring policy itself is found in the turbulent history of the effort to integrate the Jackson public schools—not even mentioned in the plurality opinion—which attests to the bona fides of the Board's current employment practices.

The record and lodgings indicate that the Commission, endowed by the State Constitution with the power to investigate complaints of discrimination and the duty to secure the equal protection of the laws, Mich. Const., Art. V, § 29, prompted and oversaw the remedial steps now under attack.[4] When the Board agreed to take specified remedial action, including the hiring and promotion of minority teachers, the Commission did not pursue its investigation of the apparent violations to the point of rendering formal findings of discrimination.

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[4] The Commission currently describes its participation in the Jackson matter as follows: "[T]he Commission investigated the allegations and sought *to remedy the apparent violations* by negotiating an order of adjustment with the Jackson Board. . . . [T]he out-of-line seniority layoff provisions in the Jackson Board of Education's employment contracts with its teachers since 1972 are consistent with overall desegregation efforts undertaken *in compliance with* the Commission's order of adjustment." Brief for Michigan Civil Rights Commission, Michigan Dept. of Civil Rights as *Amicus Curiae* 14 (emphasis added).

Instead of subjecting an already volatile school system to the further disruption of formal accusations and trials, it appears that the Board set about achieving the goals articulated in the settlement. According to the then-Superintendent of Schools, the Board was aware, at every step of the way, that "[t]he NAACP had its court suit ready if either the Board postponed the [integration] operation or abandoned the attempts. They were willing to—they were ready to go into Federal court and get a court order, as happened in Kalamazoo." Respondents' Lodging No. 3, p. 44. Rather than provoke the looming lawsuit, the Board and the Union worked with the committees to reach a solution to the racial problems plaguing the school system. In 1972, the Board explained to parents why it had adopted a voluntary integration plan:

> "Waiting for what appears the inevitable only flames passions and contributes to the difficulties of an orderly transition from a segregated to a desegregated school system. Firmly established legal precedents mandate a change. Many citizens know this to be true.
>
> "Waiting for a court order emphasizes to many that we are quite willing to disobey the law until the court orders us not to disobey the law. . . . Further, court orders cost money for both the school system and the litigants." Respondents' Lodging No. 1, pp. 1–2 (Exhibit No. 8, *Jackson I*).

An explicit Board admission or judicial determination of culpability, which petitioners and even the Solicitor General urge us to hold was required before the Board could undertake a race-conscious remedial plan, see Brief for Petitioners 27–29; Brief for United States as *Amicus Curiae* 29, would only have exposed the Board in this case to further litigation and liability, including individual liability under 42 U. S. C. § 1983, for past acts. It would have contributed nothing to the advancement of the community's urgent objective of integrating its schools.

The real irony of the argument urging mandatory, formal findings of discrimination lies in its complete disregard for a longstanding goal of civil rights reform, that of integrating schools without taking every school system to court. Our school desegregation cases imposed an affirmative duty on local school boards to see that "racial discrimination would be eliminated root and branch." *Green* v. *New Kent County School Board*, 391 U. S. 430, 437–438 (1968); see *Brown* v. *Board of Education*, 349 U. S. 294, 299 (1955). Petitioners would now have us inform the Board, having belatedly taken this Court's admonitions to heart, that it should have delayed further, disputing its obligations and forcing the aggrieved parties to seek judicial relief. This result would be wholly inconsistent with the national policies against overloading judicial dockets, maintaining groundless defenses, and impeding good-faith settlement of legal disputes. Only last Term, writing for the Court, THE CHIEF JUSTICE reaffirmed that civil rights litigation is no exception to the general policy in favor of settlements: "Indeed, Congress made clear its concern that civil rights plaintiffs not be penalized for 'helping to lessen docket congestion' by settling their cases out of court. . . . In short, settlements rather than litigation will serve the interests of plaintiffs as well as defendants." *Marek* v. *Chesny*, 473 U. S. 1, 10 (1985). It would defy equity to penalize those who achieve harmony from discord, as it would defy wisdom to impose on society the needless cost of superfluous litigation. The Court is correct to recognize, as it does at least implicitly today, that formal findings of past discrimination are not a necessary predicate to the adoption of affirmative-action policies, and that the scope of such policies need not be limited to remedying specific instances of identifiable discrimination. See *ante*, at 277 (opinion of POWELL, J.); *ante*, at 289–291 (opinion of O'CONNOR, J.).

Moreover, under the apparent circumstances of this case, we need not rely on any general awareness of "societal discrimination" to conclude that the Board's purpose is of sufficient importance to justify its limited remedial efforts. There are allegations that the imperative to integrate the public schools was urgent. Racially motivated violence had erupted at the schools, interfering with all educational objectives. We are told that, having found apparent violations of the law and a substantial underrepresentation of minority teachers, the state agency responsible for ensuring equality of treatment for all citizens of Michigan had instituted a settlement that required the Board to adopt affirmative hiring practices in lieu of further enforcement proceedings. That agency, participating as *amicus curiae* through the Attorney General of Michigan, still stands fully behind the solution that the Board and the Union adopted in Article XII, viewing it as a measure necessary to attainment of stability and educational quality in the public schools. See n. 4, *supra*. Surely, if properly presented to the District Court, this would supply the "[e]vidential support for the conclusion that remedial action is warranted" that the plurality purports to seek, *ante*, at 277. Since the District Court did not permit submission of this evidentiary support, I am at a loss as to why JUSTICE POWELL so glibly rejects the obvious solution of remanding for the factfinding he appears to recognize is necessary. See *ante*, at 278–279, n. 5.

Were I satisfied with the record before us, I would hold that the state purpose of preserving the integrity of a valid hiring policy—which in turn sought to achieve diversity and stability for the benefit of *all* students—was sufficient, in this case, to satisfy the demands of the Constitution.

V

The second part of any constitutional assessment of the disputed plan requires us to examine the means chosen to achieve the state purpose. Again, the history of Article XII, insofar as we can determine it, is the best source of assistance.

A

Testimony of both Union and school officials illustrates that the Board's obligation to integrate its faculty could not have been fulfilled meaningfully as long as layoffs continued to eliminate the last hired. See App. 41; Respondents' Lodging No. 3, p. 69 (deposition of Superintendent of Schools); Respondents' Lodging No. 2, pp. 16–20 (testimony of Union Executive Director, *Jackson I*). In addition, qualified minority teachers from other States were reluctant to uproot their lives and move to Michigan without any promise of protection from imminent layoff. The testimony suggests that the lack of some layoff protection would have crippled the efforts to recruit minority applicants. *Id.*, at 20, 55, 56. Adjustment of the layoff hierarchy under these circumstances was a necessary corollary of an affirmative hiring policy.

B

Under JUSTICE POWELL's approach, the community of Jackson, having painfully watched the hard-won benefits of its integration efforts vanish as a result of massive layoffs, would be informed today, simply, that preferential layoff protection is never permissible because hiring policies serve the same purpose at a lesser cost. See *ante*, at 283–284. As a matter of logic as well as fact, a hiring policy achieves no purpose at all if it is eviscerated by layoffs. JUSTICE POWELL's position is untenable.

JUSTICE POWELL has concluded, by focusing exclusively on the undisputed hardship of losing a job, that the Equal Protection Clause always bars race-conscious layoff plans. This analysis overlooks, however, the important fact that Article XII does not cause the loss of jobs; someone will lose a job under any layoff plan and, whoever it is, that person will not deserve it. Any *per se* prohibition against layoff protection, therefore, must rest upon a premise that the tradition of basing layoff decisions on seniority is so fundamental that its modification can never be permitted. Our cases belie that premise.

The general practice of basing employment decisions on relative seniority may be upset for the sake of other public policies. For example, a court may displace innocent workers by granting retroactive seniority to victims of employment discrimination. *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 775 (1976). Further, this Court has long held that "employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest." *Id.*, at 778. And we have recognized that collective-bargaining agreements may go further than statutes in enhancing the seniority of certain employees for the purpose of fostering legitimate interests. See *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 339–340 (1953). Accordingly, we have upheld one collectively bargained provision that bestowed enhanced seniority on those who had served in the military before employment, *id.*, at 340, and another that gave preferred seniority status to union chairmen, to the detriment of veterans. *Aeronautical Industrial District Lodge 727* v. *Campbell*, 337 U. S. 521, 529 (1949).

In *Steelworkers* v. *Weber*, 443 U. S. 193 (1979), we specifically addressed a departure from the seniority principle designed to alleviate racial disparity. In *Weber*, a private employer and a union negotiated a collective agreement that reserved for black employees one half of all openings in a plant training program, replacing the prior system of awarding all seats on the basis of seniority. This plan tampered with the expectations attendant to seniority, and redistributed opportunities to achieve an important qualification toward advancement in the company. We upheld the challenged plan under the Civil Rights Act of 1964 because it was designed to "eliminate traditional patterns of racial segregation" in the industry and did not "unnecessarily trammel the interests of the white employees." *Id.*, at 201, 208. We required no judicial finding or employer admission of past discrimination to justify that interference with the seniority hierarchy for the sake of the legitimate purposes at stake.

These cases establish that protection from layoff is not altogether unavailable as a tool for achieving legitimate societal goals. It remains to be determined whether the particular form of layoff protection embodied in Article XII falls among the permissible means for preserving minority proportions on the teaching staff.

C

Article XII is a narrow provision because it allocates the impact of an unavoidable burden proportionately between two racial groups. It places no absolute burden or benefit on one race, and, within the confines of constant minority proportions, it preserves the hierarchy of seniority in the selection of individuals for layoff. Race is a factor, along with seniority, in determining which individuals the school system will lose; it is not alone dispositive of any individual's fate. Cf. *Bakke*, 438 U. S., at 318 (opinion of POWELL, J.). Moreover, Article XII does not use layoff protection as a tool for *increasing* minority representation; achievement of that goal is entrusted to the less severe hiring policies.[5] And Article XII is narrow in the temporal sense as well. The very bilateral process that gave rise to Article XII when its adoption was necessary will also occasion its demise when remedial measures are no longer required. Finally, Article XII modifies contractual expectations that do not themselves carry any connotation of merit or achievement; it does not interfere with the "cherished American ethic" of "[f]airness in individual competition," *Bakke, supra*, at 319, n. 53, depriving individuals of an opportunity that they could be said to deserve. In all of these important ways, Article XII metes out the hardship of layoffs in a manner that achieves its purpose with the smallest possible deviation from established norms.

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[5] JUSTICE WHITE assumes that respondents' plan is equivalent to one that deliberately seeks to change the racial composition of a staff by firing and hiring members of predetermined races. *Ante*, at 295. That assumption utterly ignores the fact that the Jackson plan involves only the means for selecting the employees who will be chosen for layoffs already necessitated by external economic conditions. This plan does not seek to supplant whites with blacks, nor does it contribute in any way to the number of job losses.

The Board's goal of preserving minority proportions could have been achieved, perhaps, in a different way. For example, if layoffs had been determined by lottery, the ultimate effect would have been retention of current racial percentages. A random system, however, would place every teacher in equal jeopardy, working a much greater upheaval of the seniority hierarchy than that occasioned by Article XII; it is not at all a less restrictive means of achieving the Board's goal. Another possible approach would have been a freeze on layoffs of minority teachers. This measure, too, would have been substantially more burdensome than Article XII, not only by necessitating the layoff of a greater number of white teachers, but also by erecting an absolute distinction between the races, one to be benefited and one to be burdened, in a way that Article XII avoids. Indeed, neither petitioners nor any Justice of this Court has suggested an alternative to Article XII that would have attained the stated goal in any narrower or more equitable a fashion. Nor can I conceive of one.

VI

It is no accident that this least burdensome of all conceivable options is the very provision that the parties adopted. For Article XII was forged in the crucible of clashing interests. All of the economic powers of the predominantly white teachers' union were brought to bear against those of the elected Board, and the process yielded consensus.

The concerns that have prompted some Members of this Court to call for narrowly tailored, perhaps court-ordered, means of achieving racial balance spring from a legitimate fear that racial distinctions will again be used as a means to persecute individuals, while couched in benign phraseology. That fear has given rise to mistrust of those who profess to take remedial action, and concern that any such action "work the least harm possible to other innocent persons competing for the benefit." *Bakke, supra,* at 308 (opinion of POWELL, J.). One Justice has warned that "if innocent employees are to be made to make any sacrifices . . . , they must be represented and have had full participation rights in the negotiation process," *Firefighters* v. *Stotts,* 467 U. S., at 588, n. 3 (O'CONNOR, J., concurring), and another has called for a "principle for deciding whether preferential classifications reflect a benign remedial purpose or a malevolent stigmatic classification . . . ." *Bakke, supra,* at 294–295, n. 34 (opinion of POWELL, J.). This case answers that call.

The collective-bargaining process is a legitimate and powerful vehicle for the resolution of thorny problems, and we have favored "minimal supervision by courts and other governmental agencies over the substantive terms of collective-bargaining agreements." *American Tobacco Co.* v. *Patterson,* 456 U. S. 63, 76–77 (1982). We have also noted that "[s]ignificant freedom must be afforded employers and unions to create differing seniority systems," *California Brewers Assn.* v. *Bryant,* 444 U. S. 598, 608 (1980).[6] The perceived dangers of affirmative action misused, therefore, are naturally averted by the bilateral process of negotiation, agreement, and ratification. The best evidence that Article XII is a narrow means to serve important interests is that representatives of all affected persons, starting from diametrically opposed perspectives, have agreed to it—not once, but six times since 1972.

VII

The narrow question presented by this case, if indeed we proceed to the merits, offers no occasion for the Court to issue broad proclamations of public policy concerning the controversial issue of affirmative action. Rather, this case calls for calm, dispassionate reflection upon exactly what has been done, to whom, and why. If one honestly confronts each of those questions against the factual background suggested by the materials submitted to us, I believe the conclusion is inescapable that Article XII meets, and indeed surpasses, any standard for ensuring that race-conscious programs are necessary to achieve remedial purposes. When an elected school board and a teachers' union collectively bargain a layoff provision designed to preserve the effects of a valid minority recruitment plan by apportioning layoffs between two racial groups, as a result of a settlement achieved under the auspices of a supervisory state agency charged with protecting the civil rights of all citizens, that provision should not be upset by this Court on constitutional grounds.

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[6] This deference is warranted only if the union represents the interests of the workers fairly; a union's breach of that duty in the form of racial discrimination gives rise to an action by the worker against the union. See *Steele* v. *Louisville & Nashville R. Co.,* 323 U. S. 192, 207 (1944).

The alleged facts that I have set forth above evince, at the very least, a wealth of plausible evidence supporting the Board's position that Article XII was a legitimate and necessary response both to racial discrimination and to educational imperatives. To attempt to resolve the constitutional issue either with no historical context whatever, as the plurality has done, or on the basis of a record devoid of established facts, is to do a grave injustice not only to the Board and teachers of Jackson and to the State of Michigan, but also to individuals and governments committed to the goal of eliminating all traces of segregation throughout the country. Most of all, it does an injustice to the aspirations embodied in the Fourteenth Amendment itself. I would vacate the judgment of the Court of Appeals and remand with instructions that the case be remanded to the District Court for further proceedings consistent with the views I have expressed.[7]

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[7] I do not envy the District Court its task of sorting out what this Court has and has not held today. It is clear, at any rate, that from among the many views expressed today, two noteworthy results emerge: a majority of the Court has explicitly rejected the argument that an affirmative-action plan must be preceded by a formal finding that the entity seeking to insti-

JUSTICE STEVENS, dissenting.

In my opinion, it is not necessary to find that the Board of Education has been guilty of racial discrimination in the past to support the conclusion that it has a legitimate interest in employing more black teachers in the future. Rather than analyzing a case of this kind by asking whether minority teachers have some sort of special entitlement to jobs as a remedy for sins that were committed in the past, I believe that we should first ask whether the Board's action advances the public interest in educating children for the future. If so, I believe we should consider whether that public interest, and the manner in which it is pursued, justifies any adverse effects on the disadvantaged group.[1]

I

The Equal Protection Clause absolutely prohibits the use of race in many governmental contexts. To cite only a few: the government may not use race to decide who may serve on juries,[2] who may use public services,[3] who may marry,[4] and who may be fit parents.[5] The use of race in these situations is "utterly irrational" because it is completely unrelated

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tute the plan has committed discriminatory acts in the past; and the Court has left open whether layoffs may be used as an instrument of remedial action.

[1] "In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a 'tradition of disfavor' by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment?" *Cleburne* v. *Cleburne Living Center*, 473 U. S. 432, 453 (1985) (STEVENS, J., concurring).

[2] *Batson* v. *Kentucky*, *ante*, p. 79; *Vasquez* v. *Hillery*, 474 U. S. 254 (1985); *Rose* v. *Mitchell*, 443 U. S. 545 (1979); *Strauder* v. *West Virginia*, 100 U. S. 303 (1880).

[3] *Turner* v. *City of Memphis*, 369 U. S. 350 (1962) *(per curiam)*; *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961).

[4] *Loving* v. *Virginia*, 388 U. S. 1 (1967).

[5] *Palmore* v. *Sidoti*, 466 U. S. 429 (1984).

to any valid public purpose;[6] moreover, it is particularly pernicious because it constitutes a badge of oppression that is unfaithful to the central promise of the Fourteenth Amendment.

Nevertheless, in our present society, race is not always irrelevant to sound governmental decisionmaking.[7] To take the most obvious example, in law enforcement, if an undercover agent is needed to infiltrate a group suspected of ongoing criminal behavior—and if the members of the group are all of the same race—it would seem perfectly rational to employ an agent of that race rather than a member of a different racial class. Similarly, in a city with a recent history of racial unrest, the superintendent of police might reasonably conclude that an integrated police force could develop a better relationship with the community and thereby do a more effective job of maintaining law and order than a force composed only of white officers.

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[6] *Cleburne*, 473 U. S., at 452 (STEVENS, J., concurring in judgment) ("It would be utterly irrational to limit the franchise on the basis of height or weight; it is equally invalid to limit it on the basis of skin color"). See also *Palmore* v. *Sidoti*, 466 U. S., at 432 ("Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category").

[7] As JUSTICE MARSHALL explains, although the Court's path in *University of California Regents* v. *Bakke*, 438 U. S. 265 (1978), and *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980), is tortuous, the path at least reveals that race consciousness does not automatically violate the Equal Protection Clause. In those opinions, only two Justices of the Court suggested that race-conscious governmental efforts were inherently unconstitutional. See *id.*, at 522 (Stewart, J., dissenting, joined by REHNQUIST, J.). Cf. *id.*, at 548 (STEVENS, J., dissenting) ("Unlike Mr. Justice Stewart and MR. JUSTICE REHNQUIST, . . . I am not convinced that the Clause contains an absolute prohibition against any statutory classification based on race"). Notably, in this Court, petitioners have presented solely a constitutional theory, and have not pursued any statutory claims. Cf. *Bakke*, 438 U. S. at 408 (STEVENS, J., concurring in judgment in part and dissenting in part) (suggesting that constitutional issue need not be reached because statutory issue was dispositive).

In the context of public education,[8] it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty. For one of the most important lessons that the American public schools teach is that the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous "melting pot" do not identify essential differences among the human beings that inhabit our land. It is one thing for a white child to be taught by a white teacher that color, like beauty, is only "skin deep"; it is far more convincing to experience that truth on a day-to-day basis during the routine, ongoing learning process.

In this case, the collective-bargaining agreement between the Union and the Board of Education succinctly stated a valid public purpose—"recognition of the desirability of multi-ethnic representation on the teaching faculty," and thus "a policy of actively seeking minority group personnel." App. to Pet. for Cert. 22a. Nothing in the record—not a shred of evidence—contradicts the view that the Board's attempt to employ, and to retain, more minority teachers in the Jackson public school system served this completely sound educational purpose. Thus, there was a rational and unquestionably legitimate basis for the Board's decision to enter into the collective-bargaining agreement that petitioners have challenged, even though the agreement required special efforts to recruit and retain minority teachers.

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[8] The Court has frequently emphasized the role of public schools in our national life. See *Board of Education* v. *Pico*, 457 U. S. 853, 864 (1982) (plurality opinion) ("[P]ublic schools are vitally important . . . as vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system'"); *Ambach* v. *Norwick*, 441 U. S. 68, 76 (1979) ("The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions"); *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 30 (1973) ("'[T]he grave significance of education both to the individual and to our society' cannot be doubted"); *Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954) ("[E]ducation . . . is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment").

II

It is argued, nonetheless, that the purpose should be deemed invalid because, even if the Board of Education's judgment in this case furthered a laudable goal, some other boards might claim that their experience demonstrates that segregated classes, or segregated faculties, lead to better academic achievement. There is, however, a critical difference between a decision to *exclude* a member of a minority race because of his or her skin color and a decision to *include* more members of the minority in a school faculty for that reason.

The exclusionary decision rests on the false premise that differences in race, or in the color of a person's skin, reflect real differences that are relevant to a person's right to share in the blessings of a free society. As noted, that premise is "utterly irrational," *Cleburne* v. *Cleburne Living Center*, 473 U. S. 432, 452 (1985), and repugnant to the principles of a free and democratic society. Nevertheless, the fact that persons of different races do, indeed, have differently colored skin, may give rise to a belief that there is some significant difference between such persons. The inclusion of minority teachers in the educational process inevitably tends to dispel that illusion whereas their exclusion could only tend to foster it. The inclusionary decision is consistent with the principle that all men are created equal; the exclusionary decision is at war with that principle. One decision accords with the Equal Protection Clause of the Fourteenth Amendment; the other does not. Thus, consideration of whether the consciousness of race is exclusionary or inclusionary plainly distinguishes the Board's valid purpose in this case from a race-conscious decision that would reinforce assumptions of inequality.[9]

III

Even if there is a valid purpose to the race consciousness, however, the question that remains is whether that public purpose transcends the harm to the white teachers who are disadvantaged by the special preference the Board has given to its most recently hired minority teachers. In my view, there are two important inquiries in assessing the harm to the disadvantaged teacher. The first is an assessment of the procedures that were used to adopt, and implement, the race-conscious action.[10] The second is an evaluation of the nature of the harm itself.

In this case, there can be no question about either the fairness of the procedures used to adopt the race-conscious provision, or the propriety of its breadth. As JUSTICE MARSHALL has demonstrated, the procedures for adopting this provision were scrupulously fair. The Union that represents petitioners negotiated the provision and agreed to it; the agreement was put to a vote of the membership, and overwhelmingly approved. Again, not a shred of evidence in the record suggests *any* procedural unfairness in the adoption of the agreement. Similarly, the provision is specifically designed to achieve its objective—retaining the minority teachers that have been specially recruited to give the Jackson schools, after a period of racial unrest, an integrated faculty.[11] Thus, in striking contrast to the procedural inadequacy and unjustified breadth of the race-based classification in *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980),[12] the race-conscious layoff policy here was adopted with full participation of the disadvantaged individuals and with a narrowly circumscribed berth for the policy's operation.

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[9] Cf. *Palmore* v. *Sidoti*, 466 U. S., at 434 ("The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody"); *Buchanan* v. *Warley*, 245 U. S. 60, 81 (1917) (rejecting legitimacy of argument that the "proposed segregation will promote the public peace by preventing race conflicts").

[10] Cf. *Fullilove*, 448 U. S., at 548–549 (STEVENS, J., dissenting) (A race-based classification "does impose a special obligation to scrutinize any governmental decisionmaking process that draws nationwide distinctions between citizens on the basis of their race and incidentally also discriminates against noncitizens in the preferred racial classes. For just as procedural safeguards are necessary to guarantee impartial decisionmaking in the judicial process, so can they play a vital part in preserving the impartial character of the legislative process"). That observation is, of course, equally applicable to a context in which the governmental decision is reached through a nonlegislative process. Significantly, a reason given for what this Court frequently calls "strict scrutiny" of certain classifications is the notion that the disadvantaged class is one that has been unable to enjoy full procedural participation. See *United States* v. *Carolene Products, Co.*, 304 U. S. 144, 152–153, n. 4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry"); J. Ely, Democracy and Distrust 75–77 (1980).

Finally, we must consider the harm to petitioners. Every layoff, like every refusal to employ a qualified applicant, is a grave loss to the affected individual. However, the undisputed facts in this case demonstrate that this serious consequence to petitioners is not based on any lack of respect for their race, or on blind habit and stereotype.[13] Rather, petitioners have been laid off for a combination of two reasons: the economic conditions that have led Jackson to lay off some teachers, and the special contractual protections intended to preserve the newly integrated character of the faculty in the Jackson schools. Thus, the same harm might occur if a number of gifted young teachers had been given special contractual protection because their specialties were in short supply and if the Jackson Board of Education faced a fiscal need for layoffs. A Board decision to grant immediate tenure to a group of experts in computer technology, an athletic coach, and a language teacher, for example, might reduce the pool of teachers eligible for layoffs during a depression and therefore have precisely the same impact as the racial preference at issue here. In either case, the harm would be generated by the combination of economic conditions and the special contractual protection given a different group of teachers—a protection that, as discussed above, was justified by a valid and extremely strong public interest.[14]

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[11] The layoff provision states:

"In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff." App. to Pet. for Cert. 23a.

The layoff provision follows the agreement's statement of the goal of an increased minority presence on the faculty and of the commitment to active minority recruiting and hiring efforts. *Id.*, at 22a–23a.

[12] See 448 U. S., at 532 (STEVENS, J., dissenting).

[13] Cf. *Mathews* v. *Lucas*, 427 U. S. 495, 520–521 (1976) (STEVENS, J., dissenting).

IV

We should not lightly approve the government's use of a race-based distinction. History teaches the obvious dangers of such classifications.[15] Our ultimate goal must, of course, be "to eliminate entirely from governmental decisionmaking such irrelevant factors as a human being's race."[16] In this case, however, I am persuaded that the decision to include more minority teachers in the Jackson, Michigan, school system served a valid public purpose, that it was adopted with fair procedures and given a narrow breadth, that it transcends the harm to petitioners, and that it is a step toward that ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race. I would therefore affirm the judgment of the Court of Appeals.

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[14] The fact that the issue arises in a layoff context, rather than a hiring context, has no bearing on the equal protection question. For if the Board's interest in employing more minority teachers is sufficient to justify providing them with an extra incentive to accept jobs in Jackson, Michigan, it is also sufficient to justify their retention when the number of available jobs is reduced. JUSTICE POWELL's suggestion, *ante*, at 282–284, that there is a distinction of constitutional significance under the Equal Protection Clause between a racial preference at the time of hiring and an identical preference at the time of discharge is thus wholly unpersuasive. He seems to assume that a teacher who has been working for a few years suffers a greater harm when he is laid off than the harm suffered by an unemployed teacher who is refused a job for which he is qualified. In either event, the adverse decision forecloses "only one of several opportunities" that may be available, *ante*, at 283, to the disappointed teacher. Moreover, the distinction is artificial, for the layoff provision at issue in this case was included as part of the terms of the *hiring* of minority and other teachers under the collective-bargaining agreement.

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[15] See, *e. g.*, *Fullilove*, 448 U. S., at 534, n. 5 (STEVENS, J., dissenting).

[16] *Id.*, at 547.

HENDERSON ET AL. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84–1744. Argued April 1, 1986—Decided May 19, 1986

The Speedy Trial Act (Act) commands that a defendant be tried within 70 days of the latest of either the filing of an indictment or information, or the first appearance before a judge or magistrate. However, a provision of the Act, 18 U. S. C. § 3161(h)(1)(F) (hereafter subsection (F)), excludes from this time "[a]ny period of delay resulting from other proceedings concerning the defendant, including . . . delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." With regard to petitioners, who were ultimately convicted in Federal District Court of charges relating to the manufacture, possession, and distribution of controlled substances, the Act's 70-day period commenced on September 3, 1980, but the trial did not begin until November 1, 1982, because of various delays, including those resulting from overlapping filings by petitioners and the Government with respect to a motion to suppress certain evidence, a hearing and posthearing submissions by the parties on that motion, petitioners' motion for reconsideration of the court's denial of the motion to suppress, and petitioners' motion to dismiss the indictment because of violation of the Act. The Court of Appeals affirmed petitioners' convictions, rejecting their contention that under subsection (F) only delays that were "reasonably necessary" could be excluded from the Act's 70-day period.

Held:

1. Congress intended subsection (F) to exclude from the Act's 70-day limitation all time between the filing of a pretrial motion and the conclusion of the hearing on that motion, whether or not a delay in holding that hearing is "reasonably necessary." The plain terms of the statute exclude all time between the filing of and the hearing on a motion, whether that hearing was prompt or not. Moreover, Congress' express use of the phrase "reasonable period of delay" in another provision of the statute indicates that the exclusion of the period defined in subsection (F) was intended to be automatic. The legislative history also supports this reading of subsection (F). Nor does the phrase "or other prompt disposition" in subsection (F) imply that only reasonably necessary delays may be excluded between the time of filing and the conclusion of

the hearing. That language was intended to apply to situations where motions are decided on the papers filed without a hearing. Pp. 326–330.

2. Subsection (F) also excludes time after a hearing on a motion where the District Court awaits additional filings from the parties that are needed for proper disposition of the motion. Although the language of the statute is not clear on this point, its structure requires that such time be excluded. Pp. 330–331.

3. Under the facts in this case, there were only 69 nonexcludable days of delay before petitioners' trial, and therefore the Act was not violated. Pp. 331–333.

746 F. 2d 619, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 333.

Denise Anton argued the cause for petitioners. With her on the briefs were *Alex Reisman* and *Paul G. Sloan*.

Roger Clegg argued the cause for the United States. On the brief were *Solicitor General Fried, Assistant Attorney General Trott, Deputy Solicitor General Frey, Charles A. Rothfeld*, and *Patty Merkamp Stemler*.

JUSTICE POWELL delivered the opinion of the Court.

The Speedy Trial Act, 18 U. S. C. § 3161 *et seq.* (1982 ed. and Supp. II), as amended in 1979 and in 1984, commands that a defendant be tried within 70 days of the latest of either the filing of an indictment or information, or the first appearance before a judge or magistrate. Section 3161(h)(1)(F) excludes from this time "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." This case requires us to decide the narrow questions whether that exclusion is limited to reasonably necessary delays, and whether it applies to delays occasioned by the filing of posthearing briefs on motions.

I

A jury convicted petitioners of charges arising out of manufacture, possession, and distribution of controlled substances.[1] The evidence at trial showed that in February and April 1980 petitioner Henderson, under the alias "Richard Martin," placed orders with a scientific supply company in Ohio for chemicals that could be used in the manufacture of illegal drugs. The orders attracted the attention of the Drug Enforcement Agency. Agents obtained a warrant from a United States Magistrate, authorizing installation of an electronic transmitter in one of the chemical containers. Henderson drove from California to Ohio, picked up the second order of chemicals on June 24, and headed west. Agents lost the tracking signal despite their following by both car and plane, only to receive it later in July from petitioner Freedman's house near Watsonville, California. A search pursuant to warrant on July 17 revealed an illicit drug factory. The last of the codefendants, Peter Bell, was arraigned on September 3, 1980.[2]

The Speedy Trial Act requires that trial begin within 70 days of the latest indictment, information, or appearance—in this case, September 3. 18 U. S. C. § 3161(c)(1). A timely trial would have commenced on November 12, 1980, barring periods of excludable delay. Overlapping filings by petitioners and the Government, however, kept a suppression motion pending from its filing on November 3, 1980, through a hearing on that motion on March 25, 1981.[3] The court deferred decision on the motion pending receipt of posthearing submissions from the parties, the last of which was filed on December 15, 1981. See App. 29–31. The District Court finally denied the motion to suppress on January 19, 1982.

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[1] The jury convicted all three petitioners of conspiracy to manufacture and possess with intent to distribute methamphetamine and phenyl-2-propanone, see 21 U. S. C. § 846; petitioners Thornton and Freedman of manufacture and possession with intent to distribute of methamphetamine, see § 842(a)(1); and petitioner Henderson of traveling interstate with intent to promote the manufacture and possession of methamphetamine, see 18 U. S. C. § 1952(a)(3).

[2] Codefendant Bell was severed from petitioners' trial on November 1, 1982. All defendants who are joined for trial generally fall within the speedy trial computation of the latest codefendant. See 18 U. S. C. § 3161(h)(7). Once Bell was joined with petitioners in the September 3 superseding indictment, their 70-day period was measured with respect to his.

From January 25 to May 10, 1982, both parties filed additional motions before the District Court—on January 25 the Government moved to set the case for trial, and on March 23 petitioners moved to reconsider the motion to suppress. On February 3, the court held a hearing on the Government's motion and granted a continuance through April 21 to allow defense counsel to file a motion for reconsideration of the order denying the suppression motion.[4] After a hearing on May 10, the court denied petitioners' motion to reconsider the motion to suppress, and set a trial date of September 13, 1982. The court also entered an order excluding, for purposes of the Act, the time from May 10 to September 13 based on a provision of the Act that allows such exclusion by the Court to satisfy the "ends of justice." *Id.*, at 32–33; see 18 U. S. C. § 3161(h)(8)(A).[5]

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[3] On November 3, 1980, petitioners filed a motion to suppress evidence. 2 Record, Doc. Nos. 24–26. On November 24, petitioners filed a supplemental memorandum concerning alleged misrepresentations in the affidavit supporting the search warrant. On its own motion, the District Court rescheduled the hearing from November 26, 1980, to January 14, 1981, and again to January 28, 1981. A third continuance, at petitioner Freedman's request, moved the hearing date to February 18, 1981. Meanwhile, on January 13, petitioners filed a motion to reveal the identity of a confidential informant. At the February 18 hearing, petitioners requested and received a continuance to March 2 to reply to the Government's responses, filed only the day before. The hearing was held instead on March 25 after a 21-day continuance from the court on March 4.

[4] Petitioners filed the motion on March 23; the Government filed its response on April 14, 1982. 3 Record, Doc. Nos. 74–75.

[5] Section 3161(h)(8)(A) provides for the exclusion of

"[a]ny period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such con-

On July 23, 1982, Thornton filed a motion to dismiss the superseding indictment for violation of the Speedy Trial Act. The other two petitioners subsequently joined this motion. The District Judge held a hearing almost two months later, on September 8, and denied the motion from the bench on that date. He filed a memorandum and order outlining his reasons exactly 30 days later. At that time, the judge also entered an order excluding the time from October 8 to November 1, again based on the "interests of justice." 3 Record, Doc. Nos. 98–99. Trial commenced on November 1, 1982.

Petitioners appealed their convictions, arguing, *inter alia*, that the District Court could exclude from their Speedy Trial Act computation only delays that were "reasonably necessary." 746 F. 2d 619, 622 (CA9 1984). The Court of Appeals held that the statute "excludes delays resulting from pretrial motions without qualification." *Ibid.* The court noted that Congress had explicitly provided that the excludability of certain other delays depended on their reasonableness, but had not done so for delays from pretrial motions. *Ibid.* Judge Ferguson dissented, relying on the Act's legislative history and the interpretations of other Circuits. *Id.*, at 625–626. We granted certiorari to resolve a conflict among the Circuits.[6] 474 U. S. 900 (1985). We now affirm.

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tinuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial."

[6] Several Courts of Appeals have read into 18 U. S. C. § 3161(h)(1)(F) a requirement that only delays that are "reasonably necessary" may be excluded from the computation of the 70-day period. *United States* v. *Ray*, 768 F. 2d 991, 998–999 (CA8 1985); *United States* v. *Mitchell*, 723 F. 2d

II

The Speedy Trial Act requires that a criminal trial must commence within 70 days of the latest of a defendant's indictment, information, or appearance, barring periods of excludable delay. *United States* v. *Rojas-Contreras*, 474 U. S. 231 (1985); see 18 U. S. C. § 3161(c)(1). Section 3161(h)(1)(F) (subsection (F)) excludes from these 70 days certain delays occasioned by the filing of pretrial motions:

> "(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
>
> "(1) *Any period of delay* resulting from other proceedings concerning the defendant, including but not limited to—
>
> . . . . .
>
> "(F) *delay resulting from any pretrial motion*, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion" (emphasis added).

A

On its face, subsection (F) excludes "[a]ny period of delay" caused by "any pretrial motion," "from the filing of the motion through the conclusion of the hearing." The plain terms of the statute appear to exclude all time between the filing of and the hearing on a motion whether that hearing was prompt or not. Moreover, subsection (F) does not require

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1040, 1047 (CA1 1983); *United States* v. *Janik*, 723 F. 2d 537, 543 (CA7 1983); *United States* v. *Novak*, 715 F. 2d 810, 819–820 (CA3 1983), cert. denied *sub nom. Ware* v. *United States*, 465 U. S. 1030 (1984); *United States* v. *Cobb*, 697 F. 2d 38, 44 (CA2 1982). Other Circuits have held that § 3161(h)(1)(F) excludes without qualification the entire period between the filing of the motion and the conclusion of the hearing. 746 F. 2d 619 (CA9 1984) (case below); *United States* v. *Stafford*, 697 F. 2d 1368, 1373 (CA11 1983). Cf. *United States* v. *Horton*, 705 F. 2d 1414, 1416 (CA5), cert. denied, 464 U. S. 997 (1983).

that a period of delay be "reasonable" to be excluded, although Congress clearly knew how to limit an exclusion: in § 3161(h)(7), Congress provided for exclusion of a "reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted." Apart from this single instance, every other provision in § 3161(h) provides for exclusion of "any period of delay."[7] The provision excludes, for example, all of the time consumed by an interlocutory appeal, § 3161(h)(1)(E), by a competency examination, § 3161(h)(1)(A), and by the defendant's unavailability, § 3161(h)(3)(A). As the Court of Appeals concluded: "The difference between (7) and (1) through (6) is a strong indication that exclusion of the periods defined in (1)–(6) was intended to be automatic." 746 F. 2d, at 622.

The legislative history of the 1979 Amendments to the Act supports this reading of subsection (F).[8] That history shows that Congress was aware of the breadth of the exclusion it was enacting in subsection (F). The Senate Judiciary Committee acknowledged that "if basic standards for prompt consideration of pretrial motions are not developed," the liberalized 1979 Amendments to subsection (F) "could become a loophole which could undermine the whole Act." S. Rep. No. 96–212, p. 34 (1979). In its subsequent consideration of subsection (F), the House of Representatives did not qualify the exclusion in any way or limit such potential abuse by statute. Instead the House adopted the Senate's version "with the intention that potentially excessive and abusive use of this exclusion be precluded by district or circuit guidelines, rules, or procedures relating to motions practice." H. R. Rep. No. 96–390, p. 10 (1979). Congress clearly envisioned that any limitations should be imposed by circuit or district court rules rather than by the statute itself.[9] Such rules, developed pursuant to § 3166(f), should provide the assurance of a speedy disposition of pretrial motions.

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[7] Section 3161(h)(1)(H), which provides for the exclusion of delay from transporting a defendant "from another district, or to and from places of examination or hospitalization," presumes that any such delay over 10 days is unreasonable.

[8] The discussion in S. Rep. No. 96–212, p. 34 (1979), see *post*, at 336–337, concerns time spent *preparing pretrial motions*. The pertinent language from the Report reads:

"Although some witnesses contended that all time consumed by motions practice, from preparation through their disposition, should be excluded, the Committee finds that approach unreasonable. This is primarily because, in routine cases, preparation time should not be excluded where the questions of law are not novel and the issues of fact simple. However, the Committee would permit through its amendments to subsection (h)(8)(B) reasonable preparation time for pretrial motions in cases presenting novel questions of law or complex facts." S. Rep. No. 96–212, at 33–34.

Our holding concerns time *after the submission of pretrial motions*. We note in such situations that the trial court is in a position to determine what, if any, additional submissions that it needs from the parties, and when those submissions are due.

Petitioners largely concede these arguments and advance two other contentions for limiting subsection (F)'s exclusion to time that is "reasonably necessary" for the disposition of pretrial motions. First, they contend that the phrase "other prompt disposition" within subsection (F) implies that a district court may not unreasonably delay a criminal trial by deferring a hearing on a pretrial motion. Two of the Courts of Appeals that have limited the exclusion in subsection (F) to delays that are "reasonably necessary" have relied on this argument. *United States* v. *Janik*, 723 F. 2d 537, 543 (CA7 1983); *United States* v. *Cobb*, 697 F. 2d 38, 41–42 (CA2 1982). But a reading of subsection (F) in connection with § 3161 (h)(1)(J) (subsection (J)), which allows exclusion of up to 30 days while the district court has a motion "under advisement," *i. e.*, 30 days from the time the court receives all the papers it reasonably expects, undermines this conclusion. The phrase "prompt disposition" was intended to prevent a district court from using subsection (F) to exclude time after a motion is taken under advisement when that time fails to qualify for exclusion under subsection (J).

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[9] The dissent relies on district court rules as a basis for invoking petitioners' standard. *Post*, at 337–338, n. 2. The interpretation of the local rule, however, is a matter on which we should defer to the Court of Appeals for the Ninth Circuit. It found no violation of the rule.

It would be useful in the future for circuit and district court rules to include specific timetables, thereby giving substance to the obligations of prosecutors and defense counsel under the Speedy Trial Act.

Subsection (F), written in the disjunctive, excludes time in two situations. The first arises when a pretrial motion requires a hearing: subsection (F) on its face excludes the entire period between the filing of the motion and the conclusion of the hearing. The second situation concerns motions that require no hearing and that result in a "prompt disposition." There, the promptness requirement was "intended to provide a point at which time will cease to be excluded, where motions are decided on the papers filed without hearing." S. Rep. No. 96–212, at 34. The "point at which time will cease to be excluded" is identified by subsection (J), which permits an exclusion of 30 days from the time a motion is actually "under advisement" by the court. Without the promptness requirement in subsection (F), a court could exclude time beyond subsection (J)'s 30-day "under advisement" provision simply by designating the additional period as time "from the filing of the motion" through its "disposition" under subsection (F). As the Senate Committee on the Judiciary explained:

> "In using the words 'prompt disposition', the committee intends to make it clear that, in excluding time between filing and disposition on the papers, the Committee does not intend to permit circumvention of the 30-days, 'under advisement' provision contained in Subsection (h)(1)(J). Indeed, if motions are so simple or routine that they do not require a hearing, necessary advisement time should be considerably less than 30 days." *Ibid.*

We therefore conclude that for pretrial motions that require a hearing, the phrase "or other prompt disposition" in subsection (F) does not imply that only "reasonably necessary" delays may be excluded between the time of filing of a motion and the conclusion of the hearing thereon.

Petitioners' second argument rests on the sentence that immediately follows the extract quoted above: "Nor does the Committee intend that additional time be made eligible for exclusion by postponing the *hearing date* or other disposition of the motions beyond what is *reasonably necessary.*" *Ibid.* (emphasis added). Four Courts of Appeals have relied on this legislative history to support their "reasonably necessary" qualification in subsection (F). *United States* v. *Ray*, 768 F. 2d 991, 998 (CA8 1985); *United States* v. *Mitchell*, 723 F. 2d 1040, 1047 (CA1 1983); *United States* v. *Novak*, 715 F. 2d 810, 819 (CA3 1983), cert. denied *sub nom. Ware* v. *United States*, 465 U. S. 1030 (1984); *United States* v. *Cobb*, 697 F. 2d 38, 44 (CA2 1982).

Any qualification of subsection (F)'s exclusion based on this sentence, which appears in the paragraph discussing motions decided without a hearing, would be at odds with the plain language of the statute. It also would be contrary to other passages contained in both the House and Senate Reports that specifically concern the "hearings" provision of subsection (F). See *supra*, at 327–328. We therefore decline to read into subsection (F) a "reasonably necessary" qualification based on this single sentence from the Senate Report. We instead hold that Congress intended subsection (F) to exclude from the Speedy Trial Act's 70-day limitation all time between the filing of a motion and the conclusion of the hearing on that motion, whether or not a delay in holding that hearing is "reasonably necessary."

B

The remaining issue is whether subsection (F) excludes time after a hearing on a motion but before the district court receives all the submissions by counsel it needs to decide that motion. Cf. § 3161(h)(1) (excluding "[a]ny period of delay resulting from other proceedings concerning the defendant"). Although the language of subsection (F) is not clear on this point, we are convinced that its structure, as well as reason, requires that such time be excluded.

The provisions of the Act are designed to exclude all time that is consumed in placing the trial court in a position to dispose of a motion. See, *e. g.*, S. Rep. No. 96–212, at 9–10. District courts often find it impossible to resolve motions on which hearings have been held until the parties have submitted posthearing briefs or additional factual materials, especially where the motion presents complicated issues. It would not have been sensible for Congress to exclude automatically all the time prior to the hearing on a motion and 30 days after the motion is taken under advisement, but not the time during which the court remains unable to rule because it is awaiting the submission by counsel of additional materials. Moreover, for motions decided solely on the papers, Congress has allowed exclusion of time during which the parties are filing their briefs. 18 U. S. C. §§ 3161(h)(1)(F), (J); see *supra*, at 328–329. It is consistent with this exclusion to exclude time when the court awaits the briefs and materials needed to resolve a motion on which a hearing has been held—motions that the Senate Judiciary Committee recognized as typically more difficult than motions decided on the papers. See S. Rep. No. 96–212, at 34. We therefore hold that subsection (F) excludes time after a hearing has been held where a district court awaits additional filings from the parties that are needed for proper disposition of the motion.

III

We now calculate the number of nonexcludable days before petitioners' trial. The Act began to run on September 3, 1980, the date of arraignment of codefendant Bell. On October 22, 1980, the District Court entered—with the consent of the parties—a continuance through November 12. The District Court excluded that continuance from the Speedy Trial

Act's 70-day limit under § 3161(h)(8)(A) in "the interest of justice." App. 26–27; see 746 F. 2d, at 623–624. That exclusion is not challenged in this Court.

The motion to suppress was filed during this continuance, on November 3, 1980. App. 27. The hearing on this and subsequent motions was held on March 25, 1981. *Id.*, at 28. This time is automatically excludable under § 3161(h)(1)(F). The court declined to reach a final decision on the suppression motion at that hearing because it needed further information. *Id.*, at 28–29. The court did not receive all filings in connection with the motion until December 15, 1981, when the Government submitted its response to petitioners' memorandum and request for an evidentiary hearing. *Id.*, at 31. That time is also excludable, plus 30 days for the District Court to take the matter under advisement. We therefore exclude the period from March 25, 1981, through January 14, 1982.

On January 25, 1982, the Government filed a motion to set the case for trial, noticed for February 3. We need not decide whether this time is excludable under subsection (F) as it does not affect the disposition of this case. On February 3, the court continued the case until April 21, to afford defense counsel the opportunity to file a motion to reconsider the suppression ruling. *Ibid.* The District Court subsequently found that this time was excludable under § 3161(h)(8)(A) as a continuance necessary for the "interests of justice." *Id.*, at 34.[10] On March 23, petitioners filed their motion for reconsideration. Under subsection (F), an exclusion for this pending motion ran from March 23 until the disposition by hearing on May 10. See App. 33. At that time, the court stated that it would exclude under § 3161(h)(8)(A) the time from May 10 to September 13, the new trial date, because of the difficulty of coordinating the schedules of five defense attorneys. The court entered a similar order on September 13 that extended through the ultimate trial date of November 1, 1982. Neither of those orders is properly before us. As the case stands here, it presents 69 nonexcludable days of delay, and therefore the Speedy Trial Act was not violated.[11]

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[10] The unexplained failure of the District Court to find the delay from any continuance to be excludable until October 1982 has not been argued by either party before this Court, and therefore is also not before us.

IV

The judgment of the Court of Appeals for the Ninth Circuit is affirmed.

It is so ordered.

JUSTICE WHITE, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

The purpose of the Speedy Trial Act of 1974, as amended in 1979 and in 1984, 18 U. S. C. §3161 *et seq.* (1982 ed. and Supp. II), is to quantify and make effective the Sixth Amendment right to a a speedy trial. S. Rep. No. 96–212, p. 6 (1979); S. Rep. No. 93–1021, p. 1 (1974). To this end, the Act entitles a criminal defendant to dismissal of the charges pending against him if he is not brought to trial within 70 days of his initial appearance or indictment. 18 U. S. C. §§3161(c), 3162. In computing the running of this 70-day period, the Act permits certain periods of time to be excluded. These exclusions are designed to take account of specific and recurring periods of delay which often occur in criminal cases; they are not to be used either to undermine the time limits established by the Act, or to subvert the very purpose the Act was designed to fulfill. Nonetheless, this is precisely the result achieved by the majority's reasoning, as it allows trial judges indefinitely to delay disposing of pretrial motions. For this reason, I dissent.

As interpreted by the majority, §3161(h)(1)(F) (subsection (F)) excludes the entire period between the filing of the pretrial motion and the date on which the motion is finally taken under advisement. For motions requiring a hearing, all time is excluded from the date the motion is filed through the conclusion of the hearing. *Ante*, at 329–330. There is no requirement that the hearing be held promptly, and the reason for the delay is irrelevant. Regardless of whether a hearing is postponed due to a stipulated continuance, the sudden illness of counsel, or the trial judge's decision to play golf, until the hearing is concluded, the 70-day clock remains at a standstill. Moreover, if at the conclusion of the hearing the trial judge determines that more information would be helpful to his resolution of the motion, or if the prosecutor simply announces his intention to file supplemental papers, the period of excludable delay continues indefinitely until the court receives all of the papers it reasonably expects. Only at that point is the motion considered to be "actually under advisement," and even then, § 3161(h)(1)(J) (subsection (J)) provides for an additional 30 days before the clock begins running again.

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[11] The count is 49 days from September 3, 1980, to November 22, 1980, and 20 days from January 14, 1982, to February 3, 1982.

For pretrial motions that do not require a hearing, the majority reads subsection (F) to exclude the entire period of time from the filing of the motion through its "prompt disposition." *Ante*, at 329. As construed by the Court, however, the word "prompt" does not refer to the speed at which the trial court is required to handle the motion; instead, it merely serves to designate the "point at which time will cease to be excluded." *Ibid.* That is to say, Congress inserted the word "prompt" simply to distinguish the time at which the motion is taken under advisement from the "final" disposition, or resolution, of the pretrial motion by the court, and thus prevent trial courts from avoiding the 30-day limitation imposed by subsection (J) by claiming that the unlimited delay sanctioned by subsection (F) applies until the court finally disposes of (*i. e.*, decides) the pretrial motion. *Ante*, at 329.

As I see it, the majority has misread both subsection (F) and the Act as a whole. I read subsection (F) to require *all* pretrial motions, regardless of whether they require a hearing, to be disposed of promptly. There is no reason to believe that Congress did not intend the word "prompt" to mean exactly what it normally means, "performed readily or immediately"; "given without delay or hesitation." Webster's Third New International Dictionary, Unabridged, p. 1816 (1976). Reading the word "prompt" in subsection (F) as a synonym for "quick" rather than as an antonym for the word "final" is a far more logical reading of the statute, and is more in keeping with the overall purpose of the Speedy Trial Act. I also find no merit to the contention that the phrase "other prompt disposition" only applies to pretrial motions to be decided without a hearing. After all, there cannot be an "*other* prompt disposition" of a motion unless there was *a* prompt disposition in the first place, and the plain language of subsection (F) shows that Congress intended hearings on pretrial motions to be conducted just as promptly as any other disposition of such motions.

This reading of subsection (F) is consistent with the structure of the Speedy Trial Act taken as a whole. Subsection (F) allows for the exclusion of the period of delay occurring between the making of the pretrial motion and its submission to the trial court for decision. It is this portion of the pretrial proceedings that the Act commands must be "prompt," and the reason for such a requirement is clear: it forces the parties to submit all necessary papers, and the court to hold any necessary hearings and decide what information it needs, in a timely and orderly manner. As shown above, the use of the word "prompt" in this context does more than simply distinguish this point in time from the time when the motion is finally decided (*i. e.*, the "final" disposition of the motion); instead, it describes the pace at which both the parties and the court are to act in ensuring that the trial judge can rule on the pretrial motion as quickly as possible. The promptness requirement, in other words, expressly is designed to prevent endless and needless delays in the assembly of the relevant material necessary for the trial court to make a reasoned decision on the submitted pretrial motion.

Subsection (F) thus requires prompt submission of material to the court and efficient scheduling of pretrial hearings, and once the court receives all of the papers and arguments it reasonably expects, the motion is considered to be "actually under advisement by the court." Consistent with the purpose of the Act and the promptness requirement imposed by subsection (F), subsection (J) then gives the trial court no more than 30 days in which to consider the parties' contentions and finally to decide the motion. The period during which the court has the motion "under advisement" is governed by subsection (J), and contrary to the majority's holding, *ante*, at 328–329, its 30-day limitation period has no bearing on the speed with which the motion is submitted to the court for decision.

Construing subsection (F) as mandating the prompt scheduling of hearings and submission of material in order for the trial court to take the matter under advisement is supported not only by the language of the statute and the structure of the Act, but also by the legislative history. In explaining the 1979 Amendments to the Act which established subsection (F) in its present form, the Senate Judiciary Committee noted that this portion of the Act "must be read together with the proposed change in clause (ii) of subsection (h)(8)(B) involving 'preparation' for 'pretrial proceedings'." S. Rep. No. 96–212, p. 33 (1979).[1] The Committee expressly re-

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[1] Title 18 U. S. C. § 3161(h)(8)(B) governs the factors a judge is to consider in determining whether to grant an "ends of justice" continuance authorized by § 3161(h)(8)(A). Subsection (h)(8)(B)(ii) provides:

"Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section."

The majority characterizes this subsection as dealing only with "time spent *preparing pretrial motions*." *Ante*, at 327, n. 8 (emphasis in original). This description ignores the plain language of the subsection, which states that it applies to "preparation for pretrial proceedings or for the trial jected as "unreasonable" the suggestion that "all time consumed by motions practice, from preparation through their disposition, should be excluded," finding instead that "in routine cases, preparation time should not be excluded where the questions of law are not novel and the issues of fact simple." *Id.*, at 33–34. Even in cases involving "novel questions of law or complex facts," the Committee concluded that only "reasonable preparation time for pretrial motions" would be necessary. *Id.*, at 34. Despite the narrow reading of the legislative history by the majority, therefore, the Senate Committee clearly meant exactly what it said when it declared that it did not intend that "additional time be made eligible for exclusion by postponing the hearing date or other disposition of the motions beyond what is reasonably necessary." *Ibid.*[2]

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itself." Furthermore, the majority's statement that its "holding concerns time *after the submission of pretrial motions*" shows how far removed from the purposes of the Speedy Trial Act its opinion lies. By treating the interval between the time when pretrial motions are submitted to the court and the time when the court takes the motion "under advisement" as a time not governed either by the promptness requirement of subsection (F) or the 30-day limitation imposed by subsection (J), the Court carves out a period in which the 70-day limit imposed by the Act does not apply. This construction permits potentially excessive and abusive use of the Act's exclusions, and results in the denial of a speedy trial to a criminal defendant—the precise result which the Act was designed to avoid.

[2] The majority is correct that Congress placed a great deal of reliance on the development of local guidelines relating to motions practice to establish the specific periods of allowable delay under subsection (F). *Ante*, at 328. I disagree, however, that Congress left this potentially unlimited period of time to be governed solely by such rules. Although Congress might have intended for the district courts and circuits to quantify the precise limits acceptable under this portion of the Act, Congress made sure that, even without the development of such standards, no more time than what is "reasonably necessary" for the prompt submission of the motion to the trial court for decision would be excluded from the running of the 70-day clock established by the Act.

Moreover, even if the majority is correct that "Congress clearly envisioned that any limitations should be imposed by circuit or district court

Adhering to both the plain language of the statute and its legislative history, the majority of courts considering this question have held that subsection (F) permits the exclusion of only a reasonable amount of time for the trial court to take a pretrial motion under advisement, and that any other result would defeat the purposes of the Act. See *United States* v. *Ray*, 768 F. 2d 991, 997–999 (CA8 1985); *United States* v. *Mitchell*, 723 F. 2d 1040, 1046–1047 (CA1 1983); *United States* v. *Janik*, 723 F. 2d 537, 543–544 (CA7 1983); *United States* v. *Novak*, 715 F. 2d 810, 819–820 (CA3 1983), cert. denied *sub nom. Ware* v. *United States*, 465 U. S. 1030 (1984); *United States* v. *Cobb*, 697 F. 2d 38, 43–45 (CA2 1982); *United States* v. *Smith*, 563 F. Supp. 217, 219–220 (Md. 1983), aff'd, 750 F. 2d 1233 (CA4 1984), cert. denied, 471 U. S. 1057 (1985); *United States* v. *Hawker*, 552 F. Supp. 117, 124–125 (Mass. 1982). Similarly, the Judicial Conference of the United States recognizes that "[i]n some circumstances, the duration of this exclusion may be subject to a reasonableness requirement." Committee on the Administration of the Criminal Law of the Judicial Conference of the United States, Guidelines to the Administration of the Speedy Trial Act of 1974, as Amended (Dec. 1979 rev., with amendments through Oct. 1984), 106 F. R. D. 271, 289

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rules rather than by the statute itself," *ante*, at 328, the majority fails to consider the applicable local rules relevant to this case. These provide that "[a]ll pre-trial hearings shall be conducted as soon after the arraignment as possible, consistent with the priorities of other matters on the court's criminal docket." U. S. District Court, Northern District of California, Plan for Prompt Disposition of Criminal Cases, Sec. II(4)(F)(4) (revised, Apr. 7, 1980), California Rules of Court 822–824 (West 1986). Although this rule does not offer any specific guidance, it is sufficient to invoke the "reasonably necessary" standard intended by Congress.

Finally, the majority states that it is deferring to the Ninth Circuit's determination that the local rules were not violated in this case. *Ante*, at 328, n. 9. This finding is not supported by the record, for although the lower court cited to the local rules, 746 F. 2d 619, 623 (1984), there is no indication that the panel ever applied the rules to the facts of this case, let alone that it found that the rules had not been violated.

(1984). Finally, commentators have also noted the necessity for this construction, finding that without it, there would be no need for trial courts to process motions in a timely fashion, thus undermining the purposes of the Act. See Misner, The 1979 Amendments to the Speedy Trial Act: Death of the Planning Process, 32 Hastings L. J. 635, 654–655 (1981); Note, Speedy Trial: A Constitutional Right in Search of Definition, 61 Geo. L. J. 657, 679, and n. 136 (1973), reprinted in Hearings on S. 754 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 93d Cong., 1st Sess., 61, 83, and n. 136 (1973).

I agree with this wealth of statutory, judicial, and scholarly authority, and would hold that the Speedy Trial Act requires a trial court to take all pretrial motions under advisement in a prompt manner, and as a result, that only that period of delay found to be reasonably necessary to such a prompt handling of the motion is properly excludable under subsection (F). By holding that the entire period of delay from the filing of a pretrial motion until that motion is taken under advisement is excludable from the 70-day speedy trial computation, the majority allows this exception to swallow the rule and in so doing, undermines the entire Act. As Judge Ferguson concluded in his dissent below, "[w]hile I sympathize with the majority's search for a *per se* rule . . . I cannot agree that the desire for an 'easy' rule can justify the abrogation of the major purpose of the Speedy Trial Act—to insure the defendant a speedy trial." 746 F. 2d 619, 627 (1984). I would reverse the judgment of the Ninth Circuit, and remand for a determination of whether the delay in this case was reasonable.

BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* OWENS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 84-1905. Argued February 26, 1986—Decided May 19, 1986

Certain provisions of the Social Security Act in effect between 1979 and 1983 authorized payment of survivor's benefits to a wage earner's widowed spouse who remarried after age 60 but not to a similarly situated divorced widowed spouse. After being administratively denied survivor's benefits under these provisions because she had remarried, appellee divorced widow filed a class action in Federal District Court, challenging the constitutionality of the provisions. The court upheld the challenge, reasoning that because Congress in 1977 had chosen to treat surviving divorced spouses and widowed spouses in the same manner upon the wage earner's death, there was no logical basis for distinguishing between the two classes of individuals upon their subsequent remarriage.

Held: The provisions in question did not violate the equal protection component of the Due Process Clause of the Fifth Amendment. Pp. 345–350.

(a) When Congress decided to create some exceptions to the rule under which widowed spouses would lose their entitlement to survivor's benefits upon remarriage, it was not required to take an all-or-nothing approach but instead had valid reasons for proceeding more cautiously. Faced with concerns about the increase in the benefits that would ensue if the remarriage rule were completely eliminated, Congress reasonably could decide to concentrate limited funds where the need was likely to be greatest. Pp. 346–348.

(b) Because divorced widowed spouses did not enter into remarriage with the same level of dependency on the wage earner's account as widows or widowers, it was rational for Congress to treat these groups differently after remarriage. Any inference that because both divorced widowed spouses and widowed spouses were entitled to survivor's benefits, Congress viewed the groups as equally dependent on the wage earner, is belied by the history and provisions of the Act. Pp. 348–350.

Reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. MAR-

SHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 350. BLACKMUN, J., filed a dissenting opinion, *post*, p. 354.

Deputy Solicitor General Kuhl argued the cause for appellant. With her on the briefs were *Solicitor General Fried*, *Assistant Attorney General Willard*, *Deputy Solicitor General Geller*, *Edwin S. Kneedler*, and *William Kanter*.

Gill Deford argued the cause for appellees. With him on the brief were *Neal S. Dudovitz*, *Peter Komlos-Hrobsky*, *Sally Hart Wilson*, and *Eileen P. Sweeney*.

JUSTICE POWELL delivered the opinion of the Court.

Certain provisions of the Social Security Act in effect between 1979 and 1983 authorized payment of survivor's benefits from a wage earner's account to a widowed spouse who remarried after age 60, but not to a similarly situated divorced widowed spouse. The question in this case is whether those provisions violated the equal protection component of the Due Process Clause of the Fifth Amendment.

I

The Social Security Act (Act) originally provided only primary benefits to qualified wage earners. Congress later provided secondary benefits to wives, widows, dependent children, and surviving parents of the wage earner. At that time, widows and other secondary beneficiaries would lose their entitlement to survivor's benefits upon a subsequent marriage. In 1950, Congress extended secondary benefits to dependent husbands and widowers, subject to the same restriction. In 1958, Congress created an exception to this remarriage rule so that if a widow or widower married an individual who received benefits under the Act, neither would forfeit survivor's benefits.

Until 1965, divorced wives, including those who had outlived their former spouse (divorced widows), were not eligible for the same benefits provided to wives and widows. In that year, Congress amended § 202(b) of the Act to extend wife's benefits to a divorced wife and survivor's benefits to a divorced widow if the recipient had been married to her former husband for at least 20 years, and had received more than one-half of her support from him or an agreement or court order required him to make substantial contributions to her support. Pub. L. 89-97, § 308(a), 79 Stat. 375-376.[1] Divorced wives and divorced widows were also subject to the same remarriage rule that had been applied to widows and widowers. In these amendments, however, Congress changed the remarriage rule as it applied to widows and widowers. The new rule provided that if a widow or widower over age 60 married someone who was not entitled to receive certain benefits under the Act, she or he would not completely forfeit survivor's benefits. Instead, the benefits were reduced to half of the primary wage earner's benefits. §§ 333(a)(1) and (b)(1), 79 Stat. 403, 404.

In 1977, Congress again relaxed the remarriage provision for widows and widowers, allowing them to receive unreduced survivor's benefits if they remarried after age 60. The effective date of that amendment was 1979. Pub. L. 95-216, §§ 336(a)(3), (b)(3), (c)(1), 91 Stat. 1547.[2] But Congress retained until 1983 the provision that generally barred a divorced wife or divorced widow from receiving benefits upon remarriage. See §§ 202(b)(1)(C), (b)(3), §§ 202(e)(1)(A), (e)(1)(F). The present case involves this temporary disparity in benefits received upon remarriage.

As a result of a pair of District Court sex discrimination opinions that invalidated portions of the Act, *Ambrose* v. *Califano*, CCH Unempl. Ins. Rep. ¶ 17,702 (Ore. 1980); *Oli-*

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[1] In 1972, Congress eliminated the requirement that a divorced wife or divorced widow show a specified level of support from her former husband, but retained the 20-years-of-marriage requirement. Pub. L. 92-603, §§ 114(a), (b), 86 Stat. 1348.

[2] Congress also reduced the 20-years-of-marriage requirement for divorced wives and divorced widows to 10 years.

ver v. *Califano*, CCH Unempl. Ins. Rep. ¶15,244 (ND Cal. 1977), the Secretary of Health and Human Services (Secretary) promulgated regulations providing that divorced husbands and divorced widowers would receive husband's benefits and survivor's benefits to the same extent as divorced wives and divorced widows received wife's benefits and survivor's benefits. 44 Fed. Reg. 34480, 34483–34484 (1979); see 20 CFR §§404.331, 404.336 (1985). In 1983 Congress amended the Act to incorporate these regulatory changes. Pub. L. 98–21, §301(b)(1), 97 Stat. 111. In the same bill, Congress provided that divorced widowed spouses who remarry after age 60 are eligible to receive survivor's benefits in the same manner as widows and widowers.

II

Appellee Buenta Owens married Russell Judd in 1937 and was divorced from him in 1968. In 1978, when she was 61, she married appellee Kenneth Owens. Judd died on June 19, 1982. On July 30, 1982, Owens applied for widow's benefits on Judd's earnings account as a divorced widow. Her claim was denied on August 27, 1982, because she had remarried. She sought administrative reconsideration, contending that the statutory provision denying benefits because of her remarriage was unconstitutional. Her claim again was denied. Subsequently, Owens and the Secretary entered into an agreement stipulating that the only disputed issue was the constitutionality of the provisions of the Act that at that time denied widow's benefits to divorced widows who remarried. See 42 U. S. C. §§402(e)(1)(A), (e)(4). The parties also stipulated that, but for the relevant provisions, Owens' right to the benefits had been established. Based on that agreement, the parties waived any further administrative review. On April 19, 1983, Owens filed this action in the United States District Court for the Central District of California, and sought to represent a nationwide class of divorced widowed spouses.[3]

On December 23, 1983, the District Court rejected Owens' constitutional challenge. Applying the rational-basis standard of review, the court reasoned that Congress was justified in taking one step at a time in extending benefits to spouses who had remarried. While Owens' motion to alter or amend the judgment under Federal Rule of Civil Procedure 59 was pending, the 1983 amendments to the Act went into effect, so that all otherwise eligible members of the class became entitled to receive monthly survivor's benefits beginning in January 1984. Subsequently, the court certified a nationwide plaintiffs' class, consisting of all divorced widowed spouses who remarried after age 60 and who were denied benefits between December 1978 and January 1984.[4]

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[3] Appellee Kenneth Owens had been married to Dorothy L. Owens for over 34 years when they were divorced in 1978. In that same year he married Buenta Owens. He was 60 years old. In 1982 he applied for survivor's benefits based on the earnings account of his former wife, who had died. His claim was denied at the initial stage and again in a reconsideration decision in 1983. He and the Secretary also reached an agreement to waive any further administrative review. Kenneth Owens filed suit in the United States District Court for the Central District of California, challenging the constitutionality of the statutory provisions with an argument virtually identical to his wife's. When he filed his lawsuit, the District Court already had ruled in favor of the Secretary in Buenta Owens' suit, and her motion for reconsideration was pending. The court consolidated Kenneth Owens' suit with that of his wife. Kenneth Owens died during the pendency of this suit before this Court. Buenta Owens moved to be substituted for him as an appellee in this case, a motion we granted on February 24, 1985. Because appellees raise identical arguments, the discussion of Kenneth Owens' case is subsumed in the discussion of Buenta Owens' case.

[4] The Secretary disputes the propriety of the class certification and in particular the District Court's conclusion that the waiver of further administrative review as to the named appellees had the effect of waiving exhaustion requirements as to all the members of the class. Because we reject the equal protection claim, we do not reach the class certification issue.

On October 5, 1984, the District Court reversed its prior ruling on the merits and held the challenged provisions unconstitutional. The court agreed with the Secretary that Congress rationally could assume that widowed spouses are generally more dependent on income from the deceased wage earner than are divorced widowed spouses. It reasoned, however, that because Congress in 1977 had chosen to treat surviving divorced spouses and widowed spouses in the same manner upon the death of the wage earner, there was no logical basis for distinguishing between the two classes of individuals upon their subsequent remarriage. The Secretary appealed directly to this Court pursuant to 28 U. S. C. § 1252. We noted probable jurisdiction, *Heckler* v. *Owens*, 474 U. S. 1046 (1985). We now reverse.

III

Congress faces an unusually difficult task in providing for the distribution of benefits under the Act. The program is a massive one, and requires Congress to make many distinctions among classes of beneficiaries while making allocations from a finite fund. In that context, our review is deferential. "Governmental decisions to spend money to improve the general public welfare in one way and not another are 'not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.'" *Mathews* v. *De Castro*, 429 U. S. 181, 185 (1976), quoting *Helvering* v. *Davis*, 301 U. S. 619, 640 (1937). As this Court explained in *Flemming* v. *Nestor*, 363 U. S. 603, 611 (1960):

> "Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as [Social Security], we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification."

When the challenged classification in this case is examined in the light of these principles, it cannot be said that the distinctions Congress made were arbitrary or irrational.

A

We have previously noted that "[t]he entitlement of any secondary beneficiary is predicated on his or her relationship to a contributing wage earner." *Califano* v. *Jobst*, 434 U. S. 47, 52 (1977). In determining who is eligible for such benefits, the scope of the program does not allow for "individualized proof on a case-by-case basis." *Ibid.* Congress "has elected to use simple criteria, such as age and marital status, to determine probable dependency." *Ibid.* In particular, Congress has used marital status as a general guide to dependency on the wage earner: "The idea that marriage changes dependency is expressed throughout the Social Security Act." *Id.*, at 52, n. 8. One example of this assumption is Congress' original decision to terminate the benefits of all secondary beneficiaries, including widowed spouses, who remarried.[5] When Congress subsequently made divorced widowed spouses eligible for survivor's benefits, it also imposed on them the rule that remarriage terminated benefits. This remarriage rule was based on the assumption that remarriage altered the status of dependency on the wage earner. This Court upheld the validity of that general assumption in *Jobst*. *Id.*, at 53.

Congress was not constitutionally obligated to continue to extend benefits to any remarried secondary beneficiary. It nevertheless chose to do so, but in gradual steps. In 1965, Congress provided that if a widow or widower remarried after age 60, she or he would receive reduced benefits. In

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[5] In 1958, Congress amended this strict remarriage rule to provide that benefits would not be terminated if a widow or widower married a person who was also entitled to benefits under the Act. Pub. L. 85–840, §§ 307(b), (c), 72 Stat. 1031.

1977, Congress provided that if a widow or widower remarried after age 60, she or he would continue to receive full survivor's benefits. Finally, in 1983, Congress amended the Act to provide that divorced widowed spouses who remarry after age 60 may receive survivor's benefits in the same manner as widows and widowers. Appellees complain that Congress' failure in 1977 to extend benefits to divorced widowed spouses who had remarried was irrational.

This Court consistently has recognized that in addressing complex problems a legislature "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489 (1955). That is precisely what Congress has done in this case. When Congress decided to create some exceptions to the remarriage rule, it was not required to take an all-or-nothing approach. Instead, it chose to proceed more cautiously. It had valid reasons for doing so.

The House version of the 1977 bill contained a complete elimination of the general rule terminating benefits upon a subsequent marriage. H. R. Rep. No. 95–702, pt. 1, pp. 47–48 (1977). The House version would have created in the first year of operation alone 670,000 more beneficiaries than under the pre-1977 system,[6] costing $1.3 billion in additional benefits each year. *Ibid.*[7] Faced with these concerns, Congress reasonably could decide to "concentrate limited funds where the need [was] likely to be greatest." *Califano* v. *Boles*, 443 U. S. 282, 296 (1979). It chose only to create an exception for widows and widowers, who presumably were more likely to depend on their spouses for financial support than were divorced widows and widowers. While it may have been feasible to have extended benefits to divorced widowed spouses in 1979 rather than 1983, Congress was not constitutionally obligated to do so.

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[6] In addition to widowed spouses and divorced widowed spouses, the expanded class of beneficiaries would have included surviving parents and surviving children.

[7] The contemporaneous legislative history does not reveal what portion of that figure would have been attributable to divorced widowed spouses. A budgetary report on the 1983 amendments that eliminated the distinction between widowed spouses and divorced widowed spouses estimated the cost of that amendment as less than $50 million a year. Congress in 1977 was not required to separate out the $1.3 billion cost figure by subcategories. It was free to continue to extend benefits following marriage only to that group of secondary beneficiaries most closely tied to the wage

Congress' adjustments of this complex system of entitlements necessarily create distinctions among categories of beneficiaries, a result that could be avoided only by making sweeping changes in the Act instead of incremental ones. A constitutional rule that would invalidate Congress' attempts to proceed cautiously in awarding increased benefits might deter Congress from making any increases at all. The Due Process Clause does not impose any such "'constitutional straitjacket.'" *De Castro*, 429 U. S., at 185, quoting *Jefferson* v. *Hackney*, 406 U. S. 535, 546 (1972). As we recognized in *Jobst:*

> "Congress could reasonably take one firm step toward the goal of eliminating the hardship caused by the general marriage rule without accomplishing its entire objective in the same piece of legislation. *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489. Even if it might have been wiser to take a larger step, the step Congress did take was in the right direction and had no adverse impact on persons like the Jobsts." 434 U. S., at 57–58.

Congress drew a reasonable line in a process that soon increased benefits to all relevant beneficiaries.

B

The District Court correctly reasoned that under *De Castro* and *Boles*, it was rational for Congress to assume that

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earner, consistent with the general purposes of the Act. That $50 million annual cost is sufficient to justify fiscal concern.

divorced widowed spouses are generally less dependent upon the resources of their former spouses than are widows and widowers. It held, however, that because Congress had chosen to treat widowed spouses and divorced widowed spouses identically upon the death of the wage earner, there was no rational basis for distinguishing between them if they remarried. The logic of the District Court's position depends on a showing that Congress did not distinguish between divorced widowed spouses and widowed spouses prior to remarriage. Apparently the District Court inferred that because both divorced widowed spouses and widowed spouses were entitled to survivor's benefits, Congress viewed the groups as equally dependent on the wage earner. Such an inference is belied by the history and provisions of the Act.

When Congress first began to make divorced wives eligible for wives' benefits in 1965, it focused on that group of divorced wives whose marriages ended after many years, when they might be "too old to build up a substantial social security earnings record even if [they] can find a job." H. R. Rep. No. 213, 89th Cong., 1st Sess., 107–108 (1965). To that end, divorced wives were eligible for wife's benefits only if they had been married to the wage earner for 20 years and received substantial support from him. It was not until 1972 that Congress dropped the requirement of showing support from the wage earner. Even then, Congress retained the 20-year marriage requirement.

Congress has made the same distinctions in its treatment of divorced widowed spouses. When they first became eligible for survivor's benefits in 1965, it was under the same basic eligibility rules that applied to divorced spouses. During the relevant time of this lawsuit, divorced spouses and divorced widowed spouses had to have been married to the wage earner for at least 10 years to receive benefits. That precondition did not have to be met by spouses or widows.

These eligibility requirements demonstrate that Congress adhered to the general assumption, approved in *De Castro*, that divorce normally reduces dependency on the wage earner. The fact that Congress awards benefits to divorced widowed spouses once the eligibility requirements are met does not necessarily mean that their dependency is equivalent to that of widows or widowers. Congress may view the 10-year-marriage requirement as a lesser showing of dependency, but still sufficient to justify extension of benefits. Presumably Congress concluded that remarriage sufficiently reduced that lesser dependency to the point where it could conclude that benefits no longer were appropriate. These views would be consistent with the position Congress has taken throughout the history of the Act that divorced spouses are less dependent on the wage earner than spouses. Because divorced widowed spouses did not enter into marriage with the same level of dependency on the wage earner's account as widows or widowers, it was rational for Congress to treat these groups differently after remarriage.

IV

The judgment of the District Court is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

The Court demonstrates an enviable ability to discern rationality where there is none. But the majority's efforts to imagine plausible legislative scenarios cannot obscure the simple truth: there is absolutely no evidence that Congress had any rational basis for deciding in 1977 that surviving divorced spouses who remarried could not receive the same survivor's benefits allowed to remarried widowed spouses. Because I believe that such a distinction between two groups treated similarly in other respects cannot survive the scrutiny required by the equal protection component of the Fifth Amendment's Due Process Clause, I dissent.

I

In 1977, a Report of the House Committee on Ways and Means noted one drawback of the benefits scheme then in force:

> "Present law provides, in general, that the marriage (or remarriage) of a worker's divorced or surviving spouse, parent, or child prevents or terminates entitlement to benefits based on the worker's social security earnings record. For example, a widow who remarries before age 60 cannot get benefits based on her first husband's earnings as long as she is married. If she remarries after age 60, the benefits based on the first husband's social security are reduced or terminated; the widow gets either a wife's benefit based on her first husband's earnings (which is less than the widow's benefit she was getting) or a wife's benefit based on her current husband's earnings (if he is a beneficiary), whichever is higher. Benefits are not payable to divorced spouses and young surviving spouses who are remarried.
>
> "Your committee is especially concerned about the effect of these provisions on older surviving spouses (and divorced spouses). Accordingly, your committee has recommended changes in the law which would eliminate marriage or remarriage as a factor affecting entitlement to benefits or benefit amounts. Specifically, under your committee's bill, marriage or remarriage would not bar or terminate entitlement to benefits as a divorced spouse, surviving spouse . . . , parent, or child, and remarriage would not cause any reduction in aged widow's or widower's insurance benefits." H. R. Rep. No. 95–702, pt. 1, pp. 47–48 (1977).

The Senate version of this bill, however, did not address any of the House Committee's concerns. And a subsequent

Report tersely records the result of discussions between conferees from both Houses on this issue:

> "The Senate recedes, with an amendment that would retain only that part of the House-passed provisions that would prevent reduction in benefits for widows and widowers who remarry after age 60." H. R. Conf. Rep. No. 95–837, p. 73 (1977).

The compromise thus produced the Social Security provisions in effect between 1979 and 1983 that are the subject of this suit. Those provisions authorized payment of survivor's benefits to widowed spouses who remarried after age 60, but not to similarly situated divorced widowed spouses.

II

As a historical matter, I suspect that the Court is right to characterize the distinction drawn by the 1977 Act between widowed spouses and surviving divorced spouses as the product of Congress' decision to "take one step at a time," *ante*, at 347, toward a program that would reflect "the needs of today's society," H. R. Rep. No. 95–702, pt. 1, *supra*, at 4. However, under the Due Process Clause, even legislative classifications that result from compromise must bear at least a rational relationship to a legitimate governmental purpose. Had Congress accommodated the House's reform goals with the Senate's more conservative outlook in this area by passing a law giving benefits to only those remarried widowed spouses who had been born on odd-numbered days of the calendar, we would surely have to strike the provision down as irrational. The question here is thus whether Congress had any rational basis for taking the particular step that it chose to take in 1977.

Recognizing that it is not enough to label the 1977 provisions a way station on the road to a sensible destination, the Court argues that the statutory distinction between surviving divorced spouses and widowed spouses was based upon a legislative judgment that widowed spouses were the more dependent of the two groups. The problem with the majority's rationalization is that Congress never expressed it, or even hinted at it. The relevant legislative history contains absolutely no evidence to support the assumption that a divorced survivor is any less dependent than a widowed survivor, or to indicate that in 1977 Congress was at all motivated by that assumption.

The majority attempts to fill the gap by assuming that Congress must have perceived a distinction between divorced spouses and widowed spouses because it required that the former, but not the latter, be married to the wage earner for 10 years in order to receive benefits. That distinction can perhaps be taken as evidence that Congress believed that a divorced spouse who had been married to the wage earner for less than 10 years was not sufficiently dependent on the wage earner's income to justify the extension of benefits. Yet it can hardly be taken as an indication that surviving divorced spouses who *did* satisfy the 10-year requirement were thought any less dependent than widowed spouses. Divorced spouses meeting that requirement were not treated differently from widowed spouses for any purpose other than the remarriage provisions, and there is no indication in the statute or legislative history that Congress ever attempted to articulate a difference between the two groups justifying different treatment.

"When a legislative purpose can be suggested only by the ingenuity of a government lawyer litigating the constitutionality of a statute, a reviewing court may be presented not so much with a legislative policy choice as its absence." *Schweiker* v. *Wilson*, 450 U. S. 221, 244 (1981) (POWELL, J., dissenting); see *United States Railroad Retirement Board* v. *Fritz*, 449 U. S. 166, 184 (1980) (BRENNAN, J., dissenting). While the absence of a clear statement of purposes need not doom a statute under rationality review, our task must always be to determine whether a particular rational purpose *actually* motivated the Legislature. See *Fritz*, *supra*, at

188 (BRENNAN, J., dissenting). We have no indication in this case that Congress had any basis for drawing this line other than its desire to find a point of compromise between the two Houses. With the help of the Government's lawyers, the Court has tried hard to come up with a hypothetical justification for Congress' action. I do not think that is our job. I dissent.

JUSTICE BLACKMUN, dissenting.

I agree with JUSTICE MARSHALL that the Court has failed to identify a rational basis for Congress' decision to treat widowed spouses and surviving divorced spouses differently upon their remarriage. If anything, persons in these two categories are *more* similarly situated after remarriage than they were before, since they all then belong to family units unconnected to the primary wage earner whose earnings provide the basis for their secondary social security benefits. Cf. *Califano* v. *Jobst*, 434 U. S. 47, 53 (1977) ("marriage is an event which normally marks an important change in economic status" and "not only creates a new family . . . but also modifies . . . pre-existing relationships").

LOUISIANA PUBLIC SERVICE COMMISSION *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84-871. Argued January 13, 1986—Decided May 27, 1986*

The Communications Act of 1934 (Act) grants to the Federal Communications Commission (FCC) broad authority to develop and regulate "interstate and foreign commerce in wire and radio communication," 47 U. S. C. § 151, but also provides that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service," § 152(b). In 1980 and 1981, the FCC issued orders changing its prior rules concerning practices for depreciating telephone plant and equipment. Subsequently, upon the petition of private telephone companies, the FCC ruled that § 220 of the Act, which expressly directs the FCC to prescribe depreciation practices, operated to pre-empt inconsistent state depreciation regulations for intrastate ratemaking purposes, and that, as an alternative ground, federal displacement of state regulation was justified as being necessary to avoid frustration of validly adopted federal policies. The Court of Appeals affirmed.

Held: Section 152(b) bars federal pre-emption of state regulation over depreciation of dual jurisdiction property for intrastate ratemaking purposes. Pp. 368-379.

(a) Sections 151 and 152(b) are naturally reconciled to define a national goal of the creation of a rapid and efficient telephone service, and to enact a *dual* regulatory system to achieve that goal. P. 370.

(b) Neither the legislative history of § 152(b) nor the Act's structure supports the view that the words "charges," "classifications," and "practices," as used in § 152(b), were intended to refer only to "customer charges" for specific services and not to depreciation charges. Those words are terms of art that are to be interpreted by reference to the

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*Together with No. 84-889, *California et al.* v. *Federal Communications Commission et al.;* No. 84-1054, *Public Utilities Commission of Ohio et al.* v. *Federal Communications Commission et al.;* and No. 84-1069, *Florida Public Service Commission* v. *Federal Communications Commission et al.*, on certiorari to the same court.

trade to which they apply, and thus they embrace depreciation. Pp. 371–373.

(c) There is no merit to the argument that § 152(b) does not control because the plant involved is used interchangeably to provide both interstate and intrastate service, and that § 152(b)'s reservation of authority to state commissions should be confined to intrastate matters that do not substantially affect interstate communication. Although state regulation will generally be displaced to the extent that it stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority. Here, § 152(b) constitutes a congressional *denial* of power to the FCC to require state commissions to follow FCC depreciation practices for intrastate ratemaking purposes, and the FCC may not take "pre-emptive" action merely because it thinks such action will best effectuate federal policy. Moreover, the Act itself establishes a process designed to resolve "jurisdictional separations" matters, by which process it may be determined what portion of an asset is employed to produce or deliver interstate as opposed to intrastate service, 47 U. S. C. § 410(c). Thus it is possible to apply different rates and methods of depreciation to plant once the correct allocation between interstate and intrastate use has been made. Pp. 373–376.

(d) Nor is there merit to the argument that § 220, which directs the FCC to prescribe the classes of property for which depreciation charges may be included under operating expenses in fixing rates, and which prohibits carriers from departing from FCC-set regulations respecting depreciation, requires automatic pre-emption of all state regulation respecting depreciation. The meaning of § 220 is not so unambiguous or straightforward as to override § 152(b)'s command that "*nothing* in this chapter shall be construed to apply or to give the Commission jurisdiction" over intrastate service. Pp. 376–378.

737 F. 2d 388, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, REHNQUIST, and STEVENS, JJ., joined. BURGER, C. J., and BLACKMUN, J., dissented. POWELL and O'CONNOR, JJ., took no part in the consideration or decision of the cases.

Lawrence G. Malone argued the cause for appellant in No. 84–871 and petitioners in Nos. 84–889, 84–1054, and 84–1069. With him on the briefs for petitioners in No. 84–889 were *David E. Blabey, Margery F. Baker, Janice E. Kerr, J. Calvin Simpson, Gretchen Dumas, Jack*

Shreve, Steven W. Hamm, Raymon E. Lark, Jr., Christopher K. Sandberg, Philip Stoffregen, Patrick Nugent, Frank J. Kelley, Attorney General of Michigan, *Louis J. Caruso,* Solicitor General, *Don L. Keskey* and *Leo H. Friedman,* Assistant Attorneys General, *Lynda S. Mounts, Stuart J. Bassin, William Paul Rodgers, Jr., Joel B. Shifman, Kenneth O. Eikenberry,* Attorney General of Washington, *Larry V. Rogers,* Assistant Attorney General, *Irwin I. Kimmelman,* Attorney General of New Jersey, *Carla Vivian Bello,* Deputy Attorney General, *Joseph I. Lieberman,* Attorney General of Connecticut, *William B. Gundling, Peter J. Jenkelunas,* and *Phyllis E. Lemell,* Assistant Attorneys General, *Brian Moline, Howard C. Davenport, Lloyd N. Moore, Jr., Steven M. Schur,* and *Robert Waldrum. Michael R. Fontham, Marshall B. Brinkley, William S. Bilenky, Paul Sexton, Anthony J. Celebrezze, Jr.,* Attorney General of Ohio, *Robert S. Tongren* and *Mary R. Brandt,* Assistant Attorneys General, and *Richard P. Rosenberry* filed briefs for appellant in No. 84–871 and petitioners in Nos. 84–1054 and 84–1069.

Solicitor General Fried argued the cause for the federal parties. With him on the brief were *Deputy Solicitor General Wallace, Christopher J. Wright, Jack D. Smith, Daniel M. Armstrong,* and *Jane E. Mago.*

Michael Boudin argued the cause for respondents American Telephone and Telegraph Co. et al. With him on the brief for the American Telephone and Telegraph Co. et al. were *Donald McG. Rose, John Wohlstetter, W. Preston Granbery, Albert H. Kramer, Mark J. Mathis, D. Michael Stroud, Vincent L. Sgrosso, William O'Keefe, Carolyn C. Hill, Thomas J. Reiman, Alfred Winchell Whittaker,* and *John B. Messenger. William R. Malone, Richard McKenna,* and *Philip A. Lacovara* filed a brief for GTE Service Corp. et al.†

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†Briefs of *amici curiae* urging reversal were filed for the State of Alabama et al. by *Charles A. Graddick,* Attorney General of Alabama, and

JUSTICE BRENNAN delivered the opinion of the Court.

In these consolidated cases, we are asked by 26 private telephone companies and the United States to sustain the holding of the Court of Appeals for the Fourth Circuit that orders of the Federal Communications Commission (FCC or Commission) respecting the depreciation of telephone plant and equipment pre-empt inconsistent state regulation. They are opposed by the Public Service Commissions of 23 States, backed by 30 *amici curiae*, who argue that the Communications Act of 1934 (Act), 48 Stat. 1064, as amended, 47 U. S. C. § 151 *et seq.*, expressly denied the FCC authority to establish depreciation practices and charges insofar as they relate to the setting of rates for intrastate telephone service.

Respondents suggest that the heart of the cases is whether the revolution in telecommunications occasioned by the federal policy of increasing competition in the industry will be thwarted by state regulators who have yet to recognize or

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Stephen L. Skipper, *William James Samford, Jr.*, and *Susan Shirock DePaola;* for the State of Louisiana et al. by *William J. Guste, Jr.*, Attorney General of Louisiana, *Richard M. Troy* and *J. David McNeill III*, Assistant Attorneys General, *John L. Gubbins*, *Philip S. Shapiro*, *Barry Zitser*, *Corinne K. A. Watanabe*, Attorney General of Hawaii, *Ronald Shigekane*, Deputy Attorney General, and *Brian Burnett*, Assistant Attorney General of Utah; for the State of Maine et al. by *William E. Furber*, *James E. Tierney*, Attorney General of Maine, *Joseph G. Donahue*, *Mary L. Vanderpan*, Assistant Attorney General of South Dakota, *Michael J. Bowers*, Attorney General of Georgia, *James O. Llewellyn*, Senior Assistant Attorney General, *Michael J. Henry*, Assistant Attorney General, *Steven Clark*, Attorney General of Arkansas, *John Doehm*, Assistant Attorney General of Nebraska, *John E. Archibold*, Special Assistant Attorney General of Colorado, *Kirk J. Emge*, and *Ellyn Elise Crutcher;* for the National Conference of State Legislatures et al. by *Benna Ruth Solomon* and *Joyce Holmes Benjamin;* and for the Telephone Ratepayers Association for Cost-Based and Equitable Rates by *Jack L. Landau.*

Briefs of *amici curiae* urging affirmance were filed for MCI Telecommunications Corp. by *Laurence H. Silberman* and *Henry D. Levine;* and for the United States Telephone Association by *Jack E. Herington*, *Joseph R. Fogarty*, *H. Russell Frisby, Jr.*, and *Marcia Spielholz.*

accept this national policy and who thus refuse to permit telephone companies to employ accurate accounting methods designed to reflect, in part, the effects of competition. We are told that already there may be as much as $26 billion worth of "reserve deficiencies" on the books of the Nation's local telephone companies, a reserve which, it is insisted, represents inadequate depreciation of a magnitude that threatens the financial ability of the industry to achieve the technological progress and provide the quality of service that the Act was passed to promote. Petitioners answer that the Act clearly establishes a system of dual state and federal authority over telephone service. They contend that the Act vests in the States exclusive power over intrastate ratemaking, which power, petitioners argue, includes final authority over how depreciation shall be calculated for the purpose of setting those intrastate rates. Petitioners note also that the Due Process Clause of the Fourteenth Amendment necessarily represents a check on the power of the States to set depreciation rates at what would amount to confiscatory levels, and that respondents therefore overstate the danger of the States crippling the financial vitality of phone companies.

In deciding these cases, it goes without saying that we do not assess the wisdom of the asserted federal policy of encouraging competition within the telecommunications industry. Nor do we consider whether the FCC should have the authority to enforce, as it sees fit, practices which it believes would best effectuate this purpose. Important as these issues may be, our task is simply to determine where Congress *has* placed the responsibility for prescribing depreciation methods to be used by state commissions in setting rates for intrastate telephone service. In our view, the language, structure, and legislative history of the Act best support petitioners' position that the Act denies the FCC the power to dictate to the States as it has in these cases, and accordingly, we reverse.

I

The Act establishes, among other things, a system of dual state and federal regulation over telephone service, and it is the nature of that division of authority that these cases are about. In broad terms, the Act grants to the FCC the authority to regulate "interstate and foreign commerce in wire and radio communication," 47 U. S. C. § 151, while expressly denying that agency "jurisdiction with respect to . . . intrastate communication service . . . ." 47 U. S. C. § 152(b). However, while the Act would seem to divide the world of domestic telephone service neatly into two hemispheres—one comprised of interstate service, over which the FCC would have plenary authority, and the other made up of intrastate service, over which the States would retain exclusive jurisdiction—in practice, the realities of technology and economics belie such a clean parceling of responsibility. This is so because virtually all telephone plant that is used to provide intrastate service is also used to provide interstate service, and is thus conceivably within the jurisdiction of both state and federal authorities. Moreover, because the same carriers provide both interstate and intrastate service, actions taken by federal and state regulators within their respective domains necessarily affect the general financial health of those carriers, and hence their ability to provide service, in the other "hemisphere."

In 1980 and 1981, the FCC issued two orders that ultimately sparked this litigation. In the 1980 order the FCC changed two depreciation practices affecting telephone plant. *Property Depreciation*, 83 F. C. C. 2d 267, reconsideration denied, 87 F. C. C. 2d 916 (1981). First, the order altered how carriers could group property subject to depreciation. Because carriers employ so many individual items of equipment in providing service, it would be impossible to depreciate each item individually, and property is therefore classified and depreciated in groups. The order permitted companies the option of grouping plant for depreciation purposes based on its estimated service life (the "equal life" approach). This replaced the FCC's prior practice of requiring companies to classify and depreciate property according to its year of installation (the "vintage year" method). This change was made to allow depreciation to be based on smaller and more homogeneous groupings, which, the FCC concluded, would result in more accurate matching of capital recovery with capital consumption.

The 1980 order further sought to promote improved accounting accuracy by replacing "whole life" depreciation with the "remaining life" method. Under remaining life, and unlike the treatment under a whole life regime, if estimates upon which depreciation schedules are premised prove erroneous, they may be corrected in midcourse in a way that assures that the full cost of the asset will ultimately be recovered.

The third FCC-mandated change in plant depreciation was announced in a 1981 order, and involved the cost of labor and material associated with the installation of wire inside the premises of a business or residence. The new rule provided that this so-called "inside wiring" no longer be treated as a capital investment to be depreciated over time, but rather as a cost to be "expensed" in the year incurred. *Uniform System of Accounts*, 85 F. C. C. 2d 818.

Later in 1981, the National Association of Regulatory Utility Commissioners (NARUC) petitioned the FCC for a "clarification" of its order respecting inside wiring. Specifically, NARUC sought a declaration that the FCC's order did not restrict the discretion of state commissions to follow different depreciation practices in computing revenue requirements and rates for intrastate services.

On April 27, 1982, the FCC issued a memorandum opinion and order in which it agreed with NARUC that its order respecting the depreciation of inside wiring did not preclude state regulators "from using their own accounting and depreciation procedures for intrastate ratemaking purpose[s] . . . ." *Uniform System of Accounts*, 89 F. C. C. 2d 1094, 1095. In reaching this conclusion, the FCC declared that it had not intended the 1981 order to "have any preemptive effect that does not arise by operation of law," and added that "[n]o policy of this Commission would be furthered by requiring state commissions to adhere to the rules we have adopted for the purposes of computing the interstate revenue requirement." *Id.*, at 1097. The FCC then examined the language and legislative history of sections of the Act dealing with jurisdiction and depreciation and found that they did not support the position that unwilling state commissions either were required by operation of law or could be required in the discretion of the FCC to follow all accounting and depreciation methods prescribed by the Commission. Two commissioners issued a written dissent in which they argued that the FCC had, in its 1981 order, intended to pre-empt inconsistent state depreciation practices, and that deference to the States was especially inappropriate where an important federal policy—that of nuturing a "brave new world" of competition in the industry—was at stake.

Respondents petitioned for reconsideration of the order, and the FCC reversed itself and held that § 220 of the Act, which deals expressly with depreciation, does operate automatically to pre-empt inconsistent state action where the Commission has acted to prescribe depreciation rates for a carrier. *Amendment of Part 31*, 92 F. C. C. 2d 864 (1983). As an alternative ground in support of pre-emption, the FCC asserted that federal displacement of state regulation is justifiable under the Act when necessary "to avoid frustration of validly adopted federal policies." *Id.*, at 875. Applying this standard to the facts before it, the FCC then found preemption appropriate. It noted that "adequate capital recovery is important to 'make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, world-wide wire and radio communication service with adequate facilities at reasonable charges . . .' 47 U. S. C. 151," and that "[s]tate depreciation rate prescriptions that do not adequately provide for capital recovery in the competitive environment, which constitutes this Commission's policy in those markets found capable of supporting competition, would frustrate the accomplishment of that policy and are preemptable by this Commission." 92 F. C. C. 2d, at 876.

The Fourth Circuit affirmed. *Virginia State Corporation Comm'n* v. *FCC*, 737 F. 2d 388 (1984).[1] It acknowledged that the Act "does reserve to the states the authority to prescribe rates for intrastate telephone service," but determined that "reservation [of authority] is not to be read as preserving the states' sphere of intrastate jurisdiction at the expense of an efficient, viable interstate telecommunications network." *Id.*, at 392. The court then noted that the FCC had intended to pre-empt state practices, held that the authority to do so was statutorily entrusted to the FCC, and found that the regulations at issue were reasonably designed to ensure that federal objectives would not be frustrated. The Court of Appeals did not reach the Commission's holding that § 220 of the Act automatically operates to pre-empt state-prescribed depreciation at odds with depreciation ordered by the FCC. We granted certiorari to review the decision of the Court of Appeals. 472 U. S. 1025 (1985).[2]

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[1] Exclusive jurisdiction over final FCC orders lies with the courts of appeals. 28 U. S. C. § 2342(1).

[2] We originally postponed jurisdiction in No. 84–871, which came to us by way of appeal, rather than certiorari. A potential jurisdictional issue in that case arose as a result of the contention of the Government and the telephone companies that an appeal did not lie under 28 U. S. C. § 1254(2) because the decision of the Court of Appeals did not expressly strike down any particular state ratemaking order.

We need not address or resolve whether an appeal is proper in No. 84–871. The Louisiana Public Service Commission has asked that its jurisdictional statement be treated as a petition for a writ of certiorari, and we clearly have certiorari jurisdiction under 28 U. S. C. § 1254(1) to decide the case. We have, moreover, granted the petitions for certiorari in

II

Both petitioners and respondents characterize this litigation as one in which two different persons seek to drive one car, a condition the parties agree is unsatisfactory.[3] Where the parties disagree is with respect to who ought to be displaced from the controls. In order to address the contentions, it is appropriate to consider not only the structure of the Act and how it divides authority, but also the nature and function of depreciation as a component of utility regulation.

Depreciation is defined as the loss in service value of a capital asset over time. In the context of public utility accounting and regulation, it is a process of charging the cost of depreciable property, adjusted for net salvage, to operating expense accounts over the useful life of the asset. Thus, accounting practices significantly affect, among other things, the rates that customers pay for service. This is so because a regulated carrier is entitled to recover its reasonable expenses and a fair return on its investment through the rates

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Nos. 84-889, 84-1054, and 84-1069, 472 U. S. 1025 (1985). In accordance with our customary practice, see, *e. g.*, *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 43-44, n. 1 (1986), we dismiss the appeal in No. 84-871 and, treating the papers as a petition for certiorari, grant the writ of certiorari.

[3] Petitioners suggest that overreaching by the FCC has resulted in a situation where one person has a foot on the accelerator of a car while another person is attempting to steer. Tr. of Oral Arg. 9, 21. Although it is not evident from the metaphor whether petitioners' position is that the hand or the foot belongs to the FCC—whether, in other words, the FCC has stepped on the States' authority, or, heavy-handedly grabbed the wheel—the notion is that it is the States' responsibility under the Act to value property and to ascertain a rate base, and that it is inconsistent to confer depreciation authority—which is, according to the States, integrally bound up with valuation considerations and the determination of the rate base—on the FCC.

Respondents assert that this is "the case of two hands on the steering wheel," *id.*, at 40, by which, presumably, they mean to suggest that the hands belong to two different entities. Their position is that it makes no sense to have both the FCC and the state regulators depreciating the same piece of plant in two different ways.

it charges its customers, and because depreciation practices contribute importantly to the calculation of both the carrier's investment and its expenses. See *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 13–14 (1909). See generally, 1 A. Priest, Principles of Public Utility Regulation (1969); P. Garfield & W. Lovejoy, Public Utility Economics (1964); 1 A. Kahn, Economics of Regulation (1970).

The total amount that a carrier is entitled to charge for services, its "revenue requirement," is the sum of its current operating expenses, including taxes and depreciation expenses, and a return on its investment "rate base." The original cost of a given item of equipment enters the rate base when that item enters service. As it depreciates over time—as a function of wear and tear or technological obsolescence—the rate base is reduced according to a depreciation schedule that is based on an estimate of the item's expected useful life. Each year the amount that is removed from the rate base is included as an operating expense. In the telephone industry, which is extremely capital intensive, depreciation charges constitute a significant portion of the annual revenue requirement recovered in rates; the parties agree that depreciation charges amount to somewhere between 10% to 15% of the intrastate revenue requirement.

In essence, petitioners' argument is that the plain and unambiguous language of § 152(b) denies the FCC power to compel the States to employ FCC-set depreciation practices and schedules in connection with the setting of intrastate rates. In part, that section provides:

> "[N]othing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . ."

Petitioners maintain that "charges," "classifications," and "practices" are "terms of art" which denote depreciation and accounting, and thus that the question presented by these cases is expressly answered by the statute. They argue also that the legislative history shows on a more general level that § 152(b) was intended to reserve to the States exclusive regulatory jurisdiction over intrastate service, especially intrastate ratemaking, and that given the importance of depreciation to ratemaking, to require state regulators to follow FCC depreciation practices would frustrate the statutory design of preserving the States' ratemaking authority over intrastate service. Petitioners maintain that to confer this power on the FCC would be, in effect, to write the jurisdictional limitation of § 152(b) out of the Act.

Where petitioners focus on § 152(b), respondents' principal argument is that this litigation turns on § 220 of the Act, which they insist constitutes an unambiguous grant of power to the FCC exclusively to regulate depreciation. Their argument is that once the FCC has acted pursuant to that section, States are automatically precluded from prescribing different depreciation practices or rates. Section 220(b) states:

> "The Commission shall, as soon as practicable, prescribe for such carriers the classes of property for which depreciation charges may be properly included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. Such carriers shall not, after the Commission has prescribed the [classes] of property for which depreciation charges may be included, charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or after the Commission has prescribed percentages of depreciation, charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any case include in any form under its

> operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses."

Respondents assert that their understanding of § 220(b) is bolstered by other substantive provisions of § 220. They note, for example, that under § 220(g), once the FCC has prescribed the "forms and manner of keeping accounts," it is "unlawful . . . to keep any other accounts . . . than those so prescribed . . . or to keep the accounts in any other manner than that prescribed or approved by the Commission," and that subsections (d) and (e) of § 220 provide for civil and criminal penalties for failing to keep accounts as determined by the Commission. Moreover, § 220(h) permits the FCC in its discretion, if it finds such action to be "consistent with the public interest," to "except the carriers of any particular class or classes in any State from any of the requirements" under the section "in cases where such carriers are subject to State commission regulation with respect to matters to which this section relates." Respondents argue that this provision strongly suggests that unless the FCC affirmatively acts to waive or delegate its authority, *i. e.*, to "except" carriers from its regulation, then under § 220(h) the States impliedly cannot adopt inconsistent regulations. Respondents also assert that § 220(i) makes clear that the role of the States in depreciation is essentially advisory only. That section provides that the FCC, before exercising its authority, "shall notify" the state commissions and provide an opportunity to the States to "present [their] views" and also instructs the FCC to "consider such views and recommendations." According to respondents, "Congress gave the states an opportunity to present their views because it expected them to be bound by the resulting prescriptions." Joint Brief for Listed Private Respondents 14 (Joint Brief). In sum, the position of respondents is that "Congress clearly intended that there be one regime—rather than multiple regimes—of depreciation for each subject carrier. The FCC was given responsibility for establishing such a regime, and its depreciation decisions have to be respected unless and until it relinquishes authority to the states in individual instances. The states' interest is recognized but their role is confined to providing their 'views and recommendations.'" *Ibid.*

Although respondents rely primarily on § 220 to support pre-emption, they also urge as an alternative and independent ground the reasoning relied on by the Court of Appeals, namely that the FCC is entitled to pre-empt inconsistent state regulation which frustrates federal policy. It is in the context of this argument that respondents most forcefully contend that state regulators must not be permitted to jeopardize the continued viability of the telecommunications industry by refusing to permit carriers to depreciate plant in a way that allows for accurate and timely recapturing of capital. This argument, which is pressed especially by the Solicitor General, relies largely on § 151, which in broad terms directs the FCC to develop a rapid and efficient national telephone network.

III

The Supremacy Clause of Art. VI of the Constitution provides Congress with the power to pre-empt state law. Preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, *Jones* v. *Rath Packing Co.*, 430 U. S. 519 (1977), when there is outright or actual conflict between federal and state law, *e. g.*, *Free* v. *Bland*, 369 U. S. 663 (1962), where compliance with both federal and state law is in effect physically impossible, *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132 (1963), where there is implicit in federal law a barrier to state regulation, *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85 (1983), where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218 (1947), or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Hines* v. *Davidowitz*, 312 U. S. 52 (1941). Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation. *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141 (1982); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S. 691 (1984).

In the present cases, two of these "varieties" of pre-emption are alleged. As noted above, respondents argue that § 220 by its terms confers exclusive regulatory power over depreciation on the FCC, thus raising a claim that Congress has expressly manifested a clear intent to displace state law. In addition, respondents maintain that the refusal of the States to accept the FCC-set depreciation schedules and rules will frustrate the federal policy of increasing competition in the industry, and thus that state regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." In our view, the jurisdictional limitations placed on the FCC by § 152(b), coupled with the fact that the Act provides for a "separations" proceeding to determine the portions of a single asset that are used for interstate and intrastate service, 47 U. S. C. § 410(c), answer both pre-emption theories.

The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law. *Rice* v. *Santa Fe Elevator Corp.*, *supra.* The Act itself declares that its purpose is "regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ." 47 U. S. C. § 151. In order to accomplish this goal, Congress created the FCC to centralize and consolidate the regulatory responsibility that had previously been the province of the Interstate Commerce Commission and the Federal Radio Commission under predecessor statutes. See generally McKenna, Pre-Emption Under the Communications Act, 37 Fed. Comm. L. J. 1, 12–18 (1985). To this degree, § 151 may be read as lending some support to respondents' position that state regulation which frustrates the ability of the FCC to perform its statutory function of ensuring efficient, nationwide phone service may be impliedly barred by the Act.

We might be inclined to accept this broad reading of § 151 were it not for the express jurisdictional limitations on FCC power contained in § 152(b). Again, that section asserts that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service . . . ." By its terms, this provision fences off from FCC reach or regulation intrastate matters—indeed, including matters "in connection with" intrastate service. Moreover, the language with which it does so is certainly as sweeping as the wording of the provision declaring the purpose of the Act and the role of the FCC.

In interpreting §§ 151 and 152(b), we are guided by the familiar rule of construction that, where possible, provisions of a statute should be read so as not to create a conflict. *Washington Market Co.* v. *Hoffman*, 101 U. S. 112 (1879). We agree with petitioners that the sections are naturally reconciled to define a national goal of the creation of a rapid and efficient phone service, and to enact a *dual* regulatory system to achieve that goal. Moreover, were we to find the sections to be in conflict, we would be disinclined to favor the provision declaring a general statutory purpose, as opposed to the provision which defines the jurisdictional reach of the agency formed to implement that purpose.

Respondents advance a number of arguments to counter the view that § 152(b) forbids the FCC to prescribe depreciation practices and charges in the context of ratemaking for intrastate service. We address each in turn.

A

Respondents assert that the legislative history of § 152(b), as well as the structure of the Act, shows that "charges" and "classifications" refer only to "customer charges," not depreciation charges, and thus that § 152(b) does not purport to limit the FCC power to regulate depreciation. They seek to support this narrow reading of § 152(b) by noting that the words "charges," "classifications," "practices," and "regulations" appear throughout the Act in contexts where it is clear that what is meant is charges which relate directly to carriers' rate and service relationships with their customers, rather than depreciation or accounting charges. See §§ 201–205. Reading the sections *in pari materia,* we are told, makes it apparent that Congress was concerned in § 152(b) with preserving state autonomy over the rates charged by carriers for specific services, not over depreciation. According to respondents, this reading is bolstered by the legislative history of the section, which reveals that the provision was proposed by state regulators in reaction to this Court's decision in the so-called *Shreveport Rate Case, Houston, E. & W. T. R. Co.* v. *United States,* 234 U. S. 342 (1914), which held, among other things, that the Interstate Commerce Commission had the power to order an increase in specific intrastate railroad rates charged to customers in order to avoid discrimination against interstate commerce. "In other words, Section 2(b)(1) was from the outset concerned with protection against federal preemption of the states' setting of individual customer charges for specific intrastate services." Joint Brief 34.

We reject this narrow reading of § 152(b). "Charges," "classifications," and "practices" are terms often used by accountants, regulators, courts, and commentators to denote depreciation treatment, see, *e. g., United Railways & Elec-*

tric Co v. *West,* 280 U. S. 234, 262 (1930); *Smith* v. *Illinois Bell Telephone Co.,* 282 U. S. 133, 158 (1930); Wheat, The Regulation of Interstate Telephone Rates, 51 Harv. L. Rev. 846, 859 (1938); A. Kahn, Economics of Regulation (1970), and in accordance with the rule of construction that technical terms of art should be interpreted by reference to the trade or industry to which they apply, *Corning Glass Works* v. *Brennan,* 417 U. S. 188 (1974), we find that they do embrace depreciation. It is worth noting that the FCC itself, in the very orders underlying this litigation, used "charges" to mean "depreciation charges." *E. g., Property Depreciation,* 83 F. C. C. 2d, at 275.

Nor does the *Shreveport Rate Case* carry the load that respondents ask of it. In that case, this Court interpreted the constitutional and statutory authority of the Interstate Commerce Commission to include the power to regulate, indeed, set, intrastate rates in order to prevent discrimination against interstate traffic. It is certainly true, as respondents assert, that when Congress was drafting the Communications Act, § 152(b) was proposed and supported by the state commissions in reaction to what they perceived to be the evil of excessive federal regulation of intrastate service such as was sanctioned by the *Shreveport Rate Case;* but we find no authority in the legislative history to support respondents' position that the sole concern of the state commissioners was with "protection against federal preemption of the states' setting of individual customer charges for specific intrastate services." Joint Brief 34. Rather, the legislative history reveals that representatives from the industry and the States were fully aware that what was at stake in the Act were broad powers to regulate, including, but not limited to, the setting of individual rates, and that "[t]he question of an appropriate division between federal and state regulatory power was a dominating controversy in 1934." McKenna, 37 Fed. Comm. L. J., at 2. In other words, while we agree that provisions in both the Senate and House bills were designed to overrule the *Shreveport Rate Case*, we are not persuaded that it was anyone's understanding that this "overruling" could or should be accomplished by merely including in the Act one section which forbade the FCC to establish specific rates for certain intrastate services; had this been the intention, it would hardly have been necessary to deny the FCC the jurisdiction over "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service . . . ." Presumably, it would have sufficed simply to deny the FCC jurisdiction over "rates." In sum, given the breadth of the language of § 152(b), and the fact that it contains not only a substantive jurisdictional limitation on the FCC's power, but also a rule of statutory construction ("[N]othing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . intrastate communication service . . ."), we decline to accept the narrow view urged by respondents, and hold instead that it denies the FCC the power to pre-empt state regulation of depreciation for intrastate ratemaking purposes.

B

Accordingly, we cannot accept respondents' argument that § 152(b) does not control because the plant involved in this case is used interchangeably to provide both interstate and intrastate service, and that even if § 152(b) does reserve to the state commissions some authority over "certain aspects" of intrastate communication, it should be "confined to intrastate matters which are 'separable from and do not substantially affect' interstate communication." Joint Brief 36. With respect to the present cases, respondents insist that the refusal of the States to employ accurate measures of depreciation will have a severe impact on the interstate communications network because investment in plant will be recovered too slowly or not at all, with the result that new investment will be discouraged to the detriment of the entire network. Numerous decisions of the Courts of Appeals are cited as authority for the proposition that § 152(b) applies as a jurisdictional bar to FCC pre-emptive action only when two factors are present; first, when the matter to be regulated is purely local and second, when interstate communication is not affected by the state regulation which the FCC would seek to pre-empt. *E. g., North Carolina Utilities Comm'n* v. *FCC*, 537 F. 2d 787 (CA4), cert. denied, 429 U. S. 1027 (1976); *North Carolina Utilities Comm'n* v. *FCC*, 552 F. 2d 1036 (CA4), cert. denied, 434 U. S. 874 (1977); *Puerto Rico Telephone Co.* v. *FCC*, 553 F. 2d 694 (CA1 1977); *New York Telephone Co.* v. *FCC*, 631 F. 2d 1059 (CA2 1980).

The short answer to this argument is that it misrepresents the statutory scheme and the basis and test for pre-emption. While it is certainly true, and a basic underpinning of our federal system, that state regulation will be displaced to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, *Hines*, 312 U. S., at 67, it is also true that a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority. This is true for at least two reasons. First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency. Section 152(b) constitutes, as we have explained above, a congressional *denial* of power to the FCC to require state commissions to follow FCC depreciation practices for intrastate ratemaking purposes. Thus, we simply cannot accept an argument that the FCC may nevertheless take action which it thinks will best effectuate a federal policy. An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do.

Moreover, we reject the intimation—the position is not strongly pressed—that the FCC cannot help but pre-empt state depreciation regulation of joint plant if it is to fulfill its statutory obligation and determine depreciation for plant used to provide interstate service, *i. e.*, that it makes no sense within the context of the Act to depreciate one piece of property two ways. The Communications Act not only establishes dual state and federal regulation of telephone service; it also recognizes that jurisdictional tensions may arise as a result of the fact that interstate and intrastate service are provided by a single integrated system. Thus, the Act itself establishes a process designed to resolve what is known as "jurisdictional separations" matters, by which process it may be determined what portion of an asset is employed to produce or deliver interstate as opposed to intrastate service. 47 U. S. C. §§221(c), 410(c). Because the separations process literally separates costs such as taxes and operating expenses between interstate and intrastate service, it facilitates the creation or recognition of distinct spheres of regulation. See *Smith* v. *Illinois Bell Telephone Co.*, 282 U. S. 133 (1930). As respondents concede, and as the Court of Appeals itself acknowledged, 737 F. 2d, at 396, it is certainly possible to apply different rates and methods of depreciation to plant once the correct allocation between interstate and intrastate use has been made,[4] Brief for Respondent

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[4] Thus, these cases are readily distinguishable from those in which FCC pre-emption of state regulation was upheld where it was *not* possible to separate the interstate and the intrastate components of the asserted FCC regulation. See, *e. g., North Carolina Utilities Comm'n* v. *FCC*, 537 F. 2d 787 (CA4), cert. denied, 429 U. S. 1027 (1976), and *North Carolina Utilities Comm'n* v. *FCC*, 552 F. 2d 1036 (CA4), cert. denied, 434 U. S. 874 (1977) (Where FCC acted within its authority to permit subscribers to provide their own telephones, pre-emption of inconsistent state regulation prohibiting subscribers from connecting their own phones unless used ex-

GTE 36, just as it is possible to determine that, for example, 75% of an employee's time is devoted to the production of intrastate service, and only one quarter to interstate service, and to allocate the cost of that employee accordingly. Respondents maintain that if the FCC and the States apply different depreciation practices to the same property, then the "whole purpose of depreciation, which is to match depreciation charges of the equipment with the revenues generated by its use," will be frustrated. *Ibid.* But this is true and a concern only to the degree that the principles, judgments, and considerations that underlie depreciation rules reflect only "real world" facts, rather than choices made by regulators partially on the basis of fact and partially on the basis of such factors as the perceived need to improve the industry's cash flow, spur investment, subsidize one class of customer, or any other policy factor. What is really troubling respondents, of course, is their sense that state regulators will not allow them sufficient revenues. While we do not deprecate this concern, § 152(b) precludes both the FCC and this Court from providing the relief sought. As we so often admonish, only Congress can rewrite this statute.

C

We also reject respondents' argument that § 220, which deals specifically[5] and expressly with depreciation, requires

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clusively in interstate service upheld since state regulation would negate the federal tariff).

[5] Respondents maintain that since "[s]pecific terms prevail over the general," *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U. S. 222, 228 (1957), and § 220 deals specifically with depreciation, the general language of § 152(b) should not be read to bar FCC regulation of depreciation. The rule of construction cited by respondents is simply inapplicable in the context of these cases. First, § 152(b) deals with jurisdiction, and thus addresses a different subject than § 220, which respondents correctly characterize as involving depreciation. Thus, while § 152(b) may be more "general' than § 220, the sections are not general or specific with respect to each other. Second, § 152(b) not only imposes jurisdictional limits on the power of a federal agency, but also, by stating that nothing in the Act shall

automatic pre-emption of all state regulation respecting depreciation. As noted above, § 220 directs the FCC to prescribe the classes of property for which depreciation charges may be included under operating expenses, and prohibits carriers from departing from FCC-set regulations respecting depreciation. While it is, no doubt, possible to find some support in the broad language of the section for respondents' position, we do not find the meaning of the section so unambiguous or straightforward as to override the command of § 152(b) that "*nothing* in this chapter shall be construed to apply or to give the Commission jurisdiction" over intrastate service. We note, for example, that a very strict reading of § 220—which is what respondents urge and upon which they ultimately rely—is simply untenable. There can be no dispute, for example, regarding the fact that taxing authorities of the Federal Government are entitled to require the carriers to employ, for tax purposes, depreciation practices and schedules different from those which might be ordered by the FCC for interstate ratemaking purposes. We are advised by petitioners that carriers do, as a routine matter, keep "separate" books in this connection. Were respondents' reading of § 220 correct, this practice would violate the Act, and taxing authorities would be compelled to compute taxation on the basis of depreciation schedules employed by the FCC for ratemaking purposes. Moreover, despite the sweeping language of § 220, nowhere does it even allude to, let alone expressly refer to, depreciation as a component of state ratemaking. Nor is the word "pre-emption" used.

It is thus at least possible, as some petitioners argue, that the section was intended to do no more than spell out the authority of the FCC over depreciation in the context of interstate regulation. It is similarly plausible, as other

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be construed to extend FCC jurisdiction to intrastate service, provides its own rule of statutory construction. In other words, the Act itself, in § 152(b), presents its own specific instructions regarding the correct approach to the statute which applies to how we should read § 220.

petitioners contend, that the section, which is captioned "Accounts, records, and memoranda," was addressed to the plenary authority of the FCC to dictate how the carriers' books would be kept for the purposes of financial reporting, in order to ensure that investors and regulators would be presented with an accurate picture of the financial health of the carriers. In any event, we need not, in order to decide these cases, define fully the scope of the section, and we hold only that § 220 does not operate to pre-empt state depreciation regulation for intrastate ratemaking purposes.[6]

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[6] Respondents insist that the legislative history of the section proves that it was intended to provide the FCC with power to pre-empt state regulation over depreciation practices. They rely in particular on the fact that Congress, in drafting § 220, reenacted, almost verbatim, § 20(5) of the Interstate Commerce Act, 49 U. S. C. App. § 20(5), which, respondents contend, had already been construed to require the ICC to prescribe depreciation for both telephone companies and railroads. *Telephone and Railroad Depreciation Charges*, 118 I. C. C. 295 (1926). Respondents note further that during hearings on an early version of the Act, state commissioners testifying before Congress argued that reenactment of § 20(5) and other provisions would permit the FCC to usurp "[a]ll matters of depreciation . . . without regard to the action upon the same subject by the State Commission." Hearings on S. 6 before the Senate Committee on Interstate Commerce, 71st Cong., 2d Sess., pt. 15, p. 2243 (1930) (resolution of Montana Commission). They also note that state regulators did manage—initially—to persuade the drafters of the Act to add a new § 220(j), which expressly permitted the States to prescribe their own depreciation practices for the purposes of determining intrastate rates. The fact that this section was rejected by the Conference Committee, despite the strong support of the States, we are told, is strong evidence that Congress intended to preserve in the FCC the broad power over depreciation that had been conferred on the ICC.

We are not persuaded. First, § 20(5) of the Interstate Commerce Act had never been interpreted to prohibit state commissioners from requiring carriers to keep additional records for the purposes of intrastate ratemaking. As the FCC itself noted in its 1982 order denying pre-emption, *Uniform System of Accounts*, 89 F. C. C. 2d 1094, 1101, it was only in dictum that the ICC suggested that it possessed authority under § 20(5) to prescribe depreciation for all property that might be used in interstate commerce, and that dictum did not even purport to address

Like many statutes, the Act contains some internal inconsistencies, vague language, and areas of uncertainty. It is not a perfect puzzle into which all the pieces fit. Thus, it is with the recognition that there are not crisp answers to all of the contentions of either party that we conclude that § 152(b) represents a bar to federal pre-emption of state regulation over depreciation of dual jurisdiction property for intrastate ratemaking purposes.

For the reasons stated above, the judgment of the Court of Appeals for the Fourth Circuit is reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE and JUSTICE BLACKMUN dissent.

JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of these cases.

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whether federal prescription of depreciation would pre-empt the States from prescribing additional depreciation practices for its regulatory purposes. Moreover, that is how this Court read the ICC order. *Smith* v. *Illinois Bell Telephone Co.*, 282 U. S. 133, 159 (1930). And in *Northwestern Bell Telephone Co.* v. *Nebraska State Railway Comm'n*, 297 U. S. 471, 478 (1936), we expressly left open whether an ICC prescription, if issued, would be pre-emptive of state regulation.

Moreover, while it is true that Congress rejected the state-proposed § 220(j), again, as the FCC noted in its order denying pre-emption, respondents make too much of too little. "The record of the Congressional hearings indicates little more than that the supporters of original section 220(j) believed that the provision was desirable to resolve a previous unsettled point of law under the predecessor provision of the Interstate Commerce Act. . . . At most, this legislative history indicates that the 1934 Congress was not sure whether reenactment of the Interstate Commerce Act language would or would not preempt state accounting and depreciation rules and did not choose to resolve the question at that time." 89 F. C. C. 2d, at 1103, 1106.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL–CIO *v.* DAVIS

APPEAL FROM THE SUPREME COURT OF ALABAMA

No. 85–217. Argued February 25, 1986—Decided May 27, 1986

Appellee was formerly employed as a ship superintendent for a stevedoring company. When he, with others, attempted to organize the company's ship superintendents and to affiliate with appellant Union, a union official allegedly assured them that the Union would get them their jobs back if they were discharged for participating in union-related activities. After he was discharged apparently because of such activities, appellee filed a suit against appellant in an Alabama Circuit Court, alleging fraud and misrepresentation under an Alabama statute. The case proceeded to trial, and a jury entered a verdict in appellee's favor. Throughout the trial, appellant defended the suit on the merits, and not until its motion for judgment notwithstanding the verdict did it claim that the Circuit Court lacked jurisdiction because the suit was pre-empted by the National Labor Relations Act (NLRA). The Circuit Court denied the motion and entered judgment on the verdict. The Alabama Supreme Court affirmed, holding that the pre-emption claim was a waivable defense that was required to be affirmatively pleaded under Alabama law, and that since it was not so pleaded, it was deemed waived.

Held:

1. The Alabama Supreme Court's holding that appellant had waived its pre-emption claim by noncompliance with state procedural rules governing affirmative defenses did not present an independent and adequate state ground supporting the court's judgment, and the court erred in declining to address that claim on the merits. Pp. 387–393.

2. The general standard for determining whether state proceedings are pre-empted by the NLRA, *i.e.*, whether the conduct at issue was arguably protected or prohibited by the NLRA, *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, is applicable to this case. Where state law is pre-empted by the NLRA under *Garmon* and its progeny, the state courts lack the power to adjudicate the claims that trigger pre-emption. Here, if appellee was arguably an employee, rather than a supervisor, the pre-emption issue should be initially decided by the National Labor Relations Board (NLRB), not the state courts. Because the pre-emption issue turns on appellee's status, the appellant's pre-emption claim must be supported by a showing sufficient to permit the NLRB to find that appellee was an employee. On the

record, appellant has made no such showing. The mere lack of a conclusive determination by the NLRB as to appellee's status does not make out an arguable case for pre-emption. Pp. 394–399.

470 So. 2d 1215, affirmed.

WHITE, J., delivered the opinion of the Court, in Part I of which all other Members joined, in Part II of which BURGER, C. J., and BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, and in Part III of which all other Members, except BLACKMUN, J., joined. REHNQUIST, J., filed an opinion concurring in part and concurring in the judgment, in which POWELL, STEVENS, and O'CONNOR, JJ., joined, *post*, p. 399. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, *post*, p. 403.

Charles R. Goldburg argued the cause for appellant. With him on the briefs was *Thomas W. Gleason*.

Bayless E. Biles argued the cause and filed a brief for appellee.*

JUSTICE WHITE delivered the opinion of the Court.

The opinion in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), set forth a general standard for determining when state proceedings or regulations are pre-empted by the provisions of the National Labor Relations Act (NLRA or Act), see 29 U. S. C. § 151 *et seq.* (1982 ed. and Supp. II): Subject to exception only in limited circumstances, "[w]hen an activity is arguably subject to § 7 or § 8 of the Act [29 U. S. C. § 157 or § 158], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." 359 U. S., at 245. This general standard has been applied in a multitude of cases decided since *Garmon*, and it must be applied again today. Before addressing that question, however, we must consider the very nature of such pre-emption—whether *Garmon* pre-emption is in the nature of an affirmative de-

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*Briefs of *amici curiae* urging affirmance were filed for the Council of State Governments et al. by *Benna Ruth Solomon, Beate Bloch, Zachary D. Fasman*, and *Clifton S. Elgarten;* and for the National Right to Work Legal Defense Foundation, Inc., by *Glenn M. Taubman.*

fense that must be asserted in the trial court or be considered forever waived or whether it is in the nature of a challenge to a court's power to adjudicate that may be raised at any time.

I

Appellee Larry Davis was formerly employed by Ryan-Walsh Stevedoring Co. in Mobile, Alabama. At the times relevant to the events that gave rise to this suit, he was a ship superintendent or trainee ship superintendent. The ship superintendents apparently served as the immediate superiors of the longshoremen employed by Ryan-Walsh. They were on salary, however, and their compensation was generally lower than that received by the longshoremen, who worked on an hourly basis.

In early 1981, Ben Trione, one of the ship superintendents who worked for Ryan-Walsh, contacted appellant International Longshoremen's Association (ILA or Union), a union that represents longshoremen and other employees on the waterfront, to discuss the possibility of organizing the superintendents and affiliating with the Union. Although the parties here dispute the content of the conversations that occurred at this stage between Trione and the ILA representatives regarding the ship superintendents and their eligibility for union membership, it is undisputed that a meeting of the superintendents was organized by Trione and attended by Benny Holland, an ILA official from Houston, Texas.

At this meeting, several of the superintendents expressed a fear of being discharged for participating in union-related activities. According to Davis' witnesses, Holland's response to this was to reassure them that the Union would get them their jobs back with backpay if that happened. According to Holland, however, Holland's response was that they would be protected in that manner only if they were determined not to be supervisors under the Act and that he did not know whether or not they would be considered supervisors.[1] Holland further testified that he had submitted this issue to the Union's lawyers and had not received a definitive opinion from them by the time of the meeting. The meeting, according to all witnesses, resulted in a number of the ship superintendents, including Davis, signing pledge cards and a union charter application with the ILA.[2]

On the day following the organizational meeting, Ryan-Walsh fired Trione. Trione contacted the ILA, which supplied him with an attorney. The attorney filed an unfair labor practice charge against Ryan-Walsh with the National Labor Relations Board, alleging that Trione was an employee under the Act and that Ryan-Walsh had violated § 8(a)(1) and § 8(a)(3) of the Act by discharging him for participating in union activities. See 29 U. S. C. §§ 158(a)(1), (3).[3] The NLRB's Regional Director, however, determined that Trione was a supervisor under the Act and declined to issue a complaint.[4] Trione did not, as he had a right to do, appeal this determination to the NLRB General Counsel. See 29 CFR § 102.19 (1985). Shortly thereafter, Davis was also discharged by Ryan-Walsh, apparently for his continued efforts to organize the ship superintendents and to join the Union.

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[1] Under § 2(11) of the Act, 61 Stat. 138, a supervisor is defined as follows:

"The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U. S. C. § 152(11).

Supervisors as defined in this section are expressly not considered to be employees as defined in § 2(3) of the Act. 29 U. S. C. § 152(3).

Only employees as defined in § 2(3), however, are given rights under § 7 of the Act, 61 Stat. 140, 29 U. S. C. § 157, which provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

[2] Apparently, however, an insufficient number of cards was obtained, see 29 U. S. C. § 159(a), and no representation petition was filed with the NLRB.

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[3] Section 8(a) of the Act, 49 Stat. 452, in turn, provides in relevant part:

"It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

. . . . .

"(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ." 29 U. S. C. §§ 158(a)(1), (3).

[4] Under the Act, an employer does not commit an unfair labor practice under § 8(a)(3) if it fires a supervisor for union-related reasons: An employer "is at liberty to demand absolute loyalty from his supervisory personnel by insisting, on pain of discharge, that they neither participate in, nor retain membership in, a labor union." *Florida Power & Light Co.* v. *Electrical Workers*, 417 U. S. 790, 812 (1974). See also *Operating Engineers* v. *Jones*, 460 U. S. 669, 671, n. 1 (1983); *Beasley* v. *Food Fair of North Carolina, Inc.*, 416 U. S. 653, 656–657 (1974). An employer may, however, *allow* its supervisory employees to join a union. See *Florida Power & Light*, *supra*, at 808, 813. Even though supervisors are not covered by the Act, a discharge may constitute a § 8(a)(1) unfair labor practice if it infringes on the § 7 rights of the employer's nonsupervisory employees. See, *e. g.*, *Parker-Robb Chevrolet, Inc.*, 262 N. L. R. B. 402 (1982), aff'd *Automobile Salesmen's Union Local 1095* v. *NLRB*, 229 U. S. App. D. C. 105, 711 F. 2d 383 (1983) (summarizing post-1982 standard for finding violations of the Act in disciplinary actions taken against supervisors).

In response to Trione's complaint, the Regional Director stated his conclusions as follows:

"As a result of the investigation, it appears that further proceedings on the charge [of a violation under Section 8 of the Act] are not warranted inasmuch as the evidence disclosed that Mr. Trione was employed as a supervisor within the meaning of Section 2(11) of the Act. For this reason, Section 8(a)(3) would not be applicable to his discharge inasmuch as 'supervisors' are specifically excluded from the definition of employee under the Act. Nor is there sufficient evidence to establish that Mr. Trione's discharge violated Section 8(a)(1) of the Act. I am, therefore, refusing to issue a complaint in this matter." App. 62a–63a.

In response to his discharge, Davis filed this suit against the ILA in the Circuit Court of Mobile County, alleging fraud and misrepresentation under Ala. Code § 6–5–101 (1975).[5] The case proceeded to trial, and a jury entered a verdict in Davis' favor in the amount of $75,000. Throughout the trial, the Union defended the suit on the merits, raising no issue that the suit was pre-empted by the NLRA. In its motion for judgment notwithstanding the verdict, however, the ILA raised for the first time a claim that the state court lacked jurisdiction over the case because the field had "been preempted by federal law and federal jurisdiction." App. 96a. The Circuit Court denied the Union's motion without opinion and entered judgment on the jury's verdict.

On appeal to the Supreme Court of Alabama, the ILA argued that pre-emption was not a waivable defense and that the state fraud and misrepresentation action was pre-empted under *Garmon.* Although acknowledging that other state courts had adopted the ILA's position that NLRA preemption was nonwaivable,[6] the Alabama court held that "[i]t is not the circuit court's subject matter jurisdiction to adjudicate a damage claim for the tort of fraud—even if it arises in the context of a labor-related dispute—that is pre-empted. Rather, it is the state court's *exercise* of that power that is subject to preemption." 470 So. 2d 1215, 1216 (1985). The court's view was that as a state court of general jurisdiction the Circuit Court had had subject-matter jurisdiction over this ordinary tort claim for damages. As a waivable defense, the pre-emption claim was required under Alabama law to be affirmatively pleaded. Since it was not so pleaded, it was deemed waived.[7]

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[5] That section provides: "Misrepresentations of a material fact made willfully to deceive, or recklessly without knowledge, and acted on by the opposite party, or if made by mistake and innocently and acted on by the opposite party, constitute legal fraud."

[6] See, *e. g., Consolidated Theatres, Inc.* v. *Theatrical Stage Employees Union, Local 16,* 69 Cal. 2d 713, 447 P. 2d 325 (1968).

The Alabama Supreme Court, although holding that the ILA's pre-emption claim had been waived, stated in a footnote that if it had had occasion to reach the merits, it would have found no pre-emption:

> "The instant facts fall squarely within the 'peripheral concern' exception to federal preemption of state jurisdiction of labor-related disputes. *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 243–44 (1959). The National Labor Relations Board has already determined that an employer's supervisors are not protected by the Labor Management Relations Act. Thus, in this case, [Davis] has no remedy before the NLRB, and this dispute, although somewhat labor-related, is, at most, only of 'peripheral concern' to the NLRB. See, *e. g.*, *Linn* v. *United Plant Guard Workers Local 114*, 383 U. S. 53 (1966)." *Id.*, at 1216–1217, n. 2 (citations omitted).

The Alabama Supreme Court accordingly affirmed the judgment against the Union. The Union appealed to this Court; Davis moved to dismiss the appeal on the ground that the decision below rested on an adequate and independent state ground because the Alabama Supreme Court's decision was based on an application of a state procedural rule. The ILA's submission, however, raised a substantial question whether reliance on the procedural rule rested on an erroneous view of the scope of *Garmon* pre-emption, a matter of federal law, and hence whether the procedural ground relied on was adequate and independent. We noted probable jurisdiction, 474 U. S. 899 (1985).[8]

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[7] In reaching this conclusion, the Alabama Supreme Court noted that Alabama Rule of Civil Procedure 8(c) requires that affirmative defenses be specifically asserted and concluded that although pre-emption was not specifically listed as an affirmative defense under Rule 8 "it quite obviously falls within the nature of those defenses specifically listed." 470 So. 2d, at 1216, n. 1. See also *Powell* v. *Phenix Federal Savings & Loan Assn.*, 434 So. 2d 247 (Ala. 1983) (holding claim of pre-emption of state-law affirmative defenses to be deemed waived if not affirmatively pleaded).

II

A

Given the reliance of the Alabama Supreme Court on its procedural rule governing the presentation of affirmative defenses, we first decide whether that rule in this case represents an independent and adequate state ground supporting the judgment below. If it does, our review is at an end, for we have no authority to review state determinations of purely state law. Nor do we review federal issues that can have no effect on the state court's judgment. See, *e. g.*, *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562, 566 (1977); *Herb* v. *Pitcairn*, 324 U. S. 117, 125–126 (1945); *Fox Film Corp.* v. *Muller*, 296 U. S. 207, 210 (1935). The inquiry into the sufficiency of the asserted state ground, however, is one that we undertake ourselves. See *Michigan* v. *Long*, 463 U. S. 1032, 1038 (1983); *Abie State Bank* v. *Bryan*, 282 U. S. 765, 773 (1931).

In concluding that the Union's pre-emption claim was procedurally barred, the Alabama Supreme Court first held that because the Mobile County Circuit Court, as a state court of general jurisdiction, had subject-matter jurisdiction over the simple tort claim of misrepresentation, there could be no preemption of that court's actual jurisdiction. Only the exercise of that jurisdiction could be pre-empted.

This explanation has a certain logic to it; but the point is not whether *state* law gives the state courts jurisdiction over particular controversies but whether jurisdiction provided by state law is itself pre-empted by *federal* law vesting exclusive jurisdiction over that controversy in another body. It is clearly within Congress' powers to establish an exclusive federal forum to adjudicate issues of federal law in a particular area that Congress has the authority to regulate under the Constitution. See, *e. g.*, *Kalb* v. *Feuerstein*, 308 U. S. 433 (1940). Whether it has done so in a specific case is the question that must be answered when a party claims that a state court's jurisdiction is pre-empted. Such a determination of congressional intent and of the boundaries and character of a pre-empting congressional enactment is one of federal law. Pre-emption, the practical manifestation of the Supremacy Clause, is always a federal question.

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[8] Assuming, as we decide *infra*, that the judgment below did not rest on an independent and adequate state ground and that we therefore have jurisdiction over this case, this is a proper appeal under 28 U. S. C. § 1257(2), since the Alabama Supreme Court upheld a state statute, § 6–5–101, as applied, against a claim of federal pre-emption.

If the Alabama procedural ruling under state law implicates an underlying question of federal law, however, the state law is not an independent and adequate state ground supporting the judgment:

> "[W]hen resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded. . . . In such a case, the federal-law holding is integral to the state court's disposition of the matter, and our ruling on the issue is in no respect advisory." *Ake* v. *Oklahoma*, 470 U. S. 68, 75 (1985) (citing *Herb* v. *Pitcairn*, *supra*, at 126; *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 164 (1917)).

To determine the sufficiency of the state procedural ground relied upon by the Alabama Supreme Court we must ascertain whether that court correctly resolved the antecedent federal question regarding the nature of *Garmon* preemption under the NLRA. Specifically, the question is whether *Garmon* pre-emption is a waivable affirmative defense such that a state court may adjudicate an otherwise pre-empted claim if the *Garmon* defense is not timely raised or whether *Garmon* pre-emption is a nonwaivable foreclosure of the state court's very jurisdiction to adjudicate.

B

The Court's opinion in *Garner* v. *Teamsters*, 346 U. S. 485, 490–491 (1953), articulated what has come to be the accepted basis for the broadly pre-emptive scope of the NLRA:

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

Building on this cornerstone, the *Garmon* Court went on to set out the now well-established scope of NLRA preemption. Given the NLRA's "complex and interrelated federal scheme of law, remedy, and administration," 359 U. S., at 243, the Court held that "due regard for the federal enactment requires that state jurisdiction must yield," *id.*, at 244, when the activities sought to be regulated by a State are clearly or may fairly be assumed to be within the purview of §7 or §8. The Court acknowledged that "[a]t times it has not been clear whether the particular activity regulated by the States was governed by §7 or §8 or was, perhaps, outside both these sections." *Ibid.* Even in such ambiguous situations, however, the Court concluded that "courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board." *Id.*, at 244–245. Thus, the Court held that "[w]hen an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Id.*, at 245.

In *Construction Laborers* v. *Curry*, 371 U. S. 542 (1963), we considered the application of these principles to a situation in which the Georgia courts had awarded relief based on a complaint that contained allegations that made out "at least an arguable violation of § 8(b)." *Id.*, at 546. There, we reviewed a claim that "the subject matter of [the] suit was within the exclusive jurisdiction of the National Labor Relations Board," *id.*, at 543, and held that, even though the state court was authorized to adjudicate the claim as a matter of state law, the state court "clearly exceeded its power" in awarding relief on the complaint. *Id.*, at 548. Specifically, "the state court had no jurisdiction to issue an injunction or to adjudicate this controversy, which lay within the exclusive powers of the National Labor Relations Board." *Id.*, at 546–547.

That our conclusion was in fact jurisdictional was accentuated by our discussion of the procedural context in which the case arose. The state court had awarded a temporary injunction only, and a permanent order had not yet been issued. We rejected, however, the argument that the judgment was not yet final for purposes of our own jurisdiction:

> "[W]e believe our power to review this case rests upon solid ground. The federal question raised by petitioner in the Georgia court, and here, is whether the Georgia courts had power to proceed with and determine this controversy. The issue ripe for review is not whether a

> Georgia court has erroneously decided a matter of federal law in a case admittedly within its jurisdiction nor is it the question of whether federal or state law governs a case properly before the Georgia courts. What we do have here is a judgment of the Georgia court finally and erroneously asserting its jurisdiction to deal with a controversy which is beyond its power and instead is within the exclusive domain of the National Labor Relations Board." *Id.*, at 548 (citations omitted).

See also *Belknap, Inc.* v. *Hale*, 463 U. S. 491, 497–498, n. 5 (1983). *Curry* made clear that when a state proceeding or regulation is claimed to be pre-empted by the NLRA under *Garmon*, the issue is a choice-of-forum rather than a choice-of-law question. As such, it is a question whether the State or the Board has jurisdiction over the dispute. If there is pre-emption under *Garmon*, then state jurisdiction is extinguished.[9]

Since *Garmon* and *Curry*, we have reiterated many times the general pre-emption standard set forth in *Garmon* and the jurisdictional nature of *Garmon* pre-emption; we have also reaffirmed that our decisions describing the nature of *Garmon* pre-emption and defining its boundaries have rested on a determination that in enacting the NLRA Congress intended for the Board generally to exercise exclusive jurisdiction in this area. See, *e. g.*, *Journeymen* v. *Borden*, 373 U. S. 690, 698 (1963); *Iron Workers* v. *Perko*, 373 U. S. 701, 708 (1963); *Liner* v. *Jafco, Inc.*, 375 U. S. 301, 309–310 (1964); *Linn* v. *Plant Guard Workers*, 383 U. S. 53, 60 (1966); *Vaca* v. *Sipes*, 386 U. S. 171, 179 (1967); *Motor Coach Em-*

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[9] We note that this conclusion derives from congressional intent as delineated in our prior decisions. Thus, our decision today does not apply to pre-emption claims generally but only to those pre-emption claims that go to the State's actual adjudicatory or regulatory power as opposed to the State's substantive laws. The nature of any specific pre-emption claim will depend on congressional intent in enacting the particular pre-empting statute.

ployees v. *Lockridge*, 403 U. S. 274, 285–291 (1971); *Farmer* v. *Carpenters*, 430 U. S. 290, 296–297, 305 (1977); *Sears, Roebuck & Co.* v. *Carpenters*, 436 U. S. 180, 188–190 (1978); *Operating Engineers* v. *Jones*, 460 U. S. 669, 676 (1983); *Belknap, Inc.* v. *Hale, supra*, at 510–511; *Brown* v. *Hotel Employees*, 468 U. S. 491, 502–503 (1984); *Wisconsin Dept. of Industry, Labor and Human Relations* v. *Gould Inc.*, 475 U. S. 282, 286 (1986).

Davis does not seriously dispute this conclusion—at least as a general matter. He concedes, in fact, that "when a particular issue has been placed by Congress within the primary and exclusive jurisdiction of the NLRB, a state court will have no subject matter jurisdiction to adjudicate the issue. In such cases, any judgment issued by the state court will be *void ab initio* because subject matter jurisdiction is preempted." Brief for Appellee 13. Davis notes, however, that this Court has acknowledged that *Garmon* does not preempt "all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously, much of this is left to the States." *Lockridge, supra*, at 289. Specifically, Davis points to *Garmon*'s own recognition that some controversies that are arguably subject to § 7 or § 8 are not pre-empted:

> "[D]ue regard for the presuppositions of our embracing federal system . . . has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." 359 U. S., at 243–244 (citations omitted).

Both before and since *Garmon* we have identified claims that fall within one or both these articulated exceptions. See, *e. g.*, *Belknap, Inc.* v. *Hale, supra; Farmer* v. *Carpen-*

ters, supra; Linn v. *Plant Guard Workers, supra; Automobile Workers* v. *Russell*, 356 U. S. 634 (1958); *Machinists* v. *Gonzales*, 356 U. S. 617 (1958); *Youngdahl* v. *Rainfair, Inc.*, 355 U. S. 131 (1957); *Construction Workers* v. *Laburnum Construction Corp.*, 347 U. S. 656 (1954).[10] But these cases serve only as more precise demarcations of the *scope* of *Garmon* pre-emption. They have not redefined the *nature* of that pre-emption in any way. A claim of *Garmon* pre-emption is a claim that the state court has no power to adjudicate the subject matter of the case, and when a claim of *Garmon* pre-emption is raised, it must be considered and resolved by the state court. Consequently, the state procedural rule relied on by the Alabama Supreme Court to support the judgment below was not a sufficient state ground, and the Union was and is entitled to an adjudication of its pre-emption claim on the merits.[11]

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[10] We have also acknowledged an exception for conduct that is arguably protected under § 7 where the injured party has no means of bringing the dispute before the Board. See *Sears, Roebuck & Co.* v. *Carpenters*, 436 U. S. 180 (1978). See also *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274, 325–332 (1971) (WHITE, J., dissenting); *Longshoremen* v. *Ariadne Shipping Co.*, 397 U. S. 195, 201–202 (1970) (WHITE, J., concurring).

[11] Our reasoning and decision here are supported by this Court's decision in *Kalb* v. *Feuerstein*, 308 U. S. 433 (1940). In that case, the Court faced an issue involving state jurisdiction in a bankruptcy case that was strikingly similar to the issue presented by this case. There, a state court had entered a judgment of foreclosure against the appellants. Although the appellants had a petition pending concurrently in the bankruptcy court, the state courts rejected their challenge that the foreclosure was invalid because of the pending bankruptcy proceedings on the basis of a procedural default. In the face of the appellees' assertion that the procedural default presented an adequate nonfederal ground for the State's judgment, however, this Court accepted the appellants' contention that federal law itself "oust[ed] the jurisdiction of the state court" during the pendency of the bankruptcy proceeding. The state judgment thus "was not merely erroneous but was beyond [the state court's] power, void, and subject to collateral attack." *Id.*, at 438. The Court based this holding on Congress' exclusive right to regulate bankruptcy, which gave it the power to vest jurisdiction over bankruptcy proceedings exclusively in one forum and to withdraw

III

As the *Garmon* line of cases directs, the pre-emption inquiry is whether the conduct at issue was arguably protected or prohibited by the NLRA. That much is clear. There is also no dispute that if Davis was a supervisor, he was legally fired,[12] the Union misspoke if it represented that there was legal redress for the discharge, and there is no pre-emption. But if Davis was an employee, his discharge for union activities was an unfair practice, the Union was protected in its attempt to interest him in the Union, and it did not err in representing that if he was discharged for joining the Union, there would be a remedy. We should inquire, then, whether Davis was arguably an employee, rather than a supervisor. If he was, the issue was to be initially decided by the NLRB, not the state courts.

The precondition for pre-emption, that the conduct be "arguably" protected or prohibited, is not without substance. It is not satisfied by a conclusory assertion of pre-emption and would therefore not be satisfied in this case by a claim,

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that jurisdiction from all other forums, and Congress' statutory exercise of that right.

Given our longstanding interpretation of congressional intent regarding NLRA pre-emption under *Garmon*, this case is in all relevant respects the same as *Kalb*. Based on its constitutional power to regulate interstate commerce, Congress has created by statute a uniform body of laws governing labor relations and has vested in the National Labor Relations Board the exclusive jurisdiction over administration of those laws. And, although the exclusive nature of this jurisdiction was not explicitly noted by Congress, this Court has held that such exclusivity was intended by Congress. Enactment of such exclusive jurisdiction must, by operation of the Supremacy Clause, pre-empt conflicting state-court jurisdiction. That the entity chosen to administer those laws is administrative rather than judicial, as in *Kalb*, does not alter the pre-emptive effect of the federal law. Consequently, a procedural default in state court does not protect a state-court judgment from pre-emption.

[12] There is no allegation or evidence here that Davis' discharge, assuming he was a supervisor, was aimed at Ryan-Walsh's nonsupervisory employees or that it interfered with those employees' § 7 rights. See n. 4, *supra*.

without more, that Davis was an employee rather than a supervisor. If the word "arguably" is to mean anything, it must mean that the party claiming pre-emption is required to demonstrate that his case is one that the Board could legally decide in his favor. That is, a party asserting pre-emption must advance an interpretation of the Act that is not plainly contrary to its language and that has not been "authoritatively rejected" by the courts or the Board. *Marine Engineers* v. *Interlake S.S. Co.*, 370 U. S. 173, 184 (1962). The party must then put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim based on such an interpretation. In this case, therefore, because the pre-emption issue turns on Davis' status, the Union's claim of pre-emption must be supported by a showing sufficient to permit the Board to find that Davis was an employee, not a supervisor. Our examination of the record leads us to conclude that the Union has not carried its burden in this case.

Expecting that the Union would put its best foot forward in this Court, we look first at its submission here that there is an arguable case for pre-emption. The Union's brief states that its conduct was protected by federal law if Davis was an employee, that in order to find the Union liable the jury must have found that Davis was a supervisor, and that "the state law controversy of whether the Union made a misrepresentation and the federal controversy of whether the superintendents were in fact supervisors are 'the same in a fundamental respect.'" Brief for Appellant 16 (quoting *Operating Engineers* v. *Jones*, 460 U. S., at 682). So far, the argument proceeds in the right direction. As for the critical issue of whether Davis is an employee or a supervisor, the Union asserts only that "[a]bsent a clear determination by the NLRB that the ship superintendents are supervisors rather than employees, superintendents are arguably employees and the state is preempted from applying its law." Brief for Appellant 13. In making this contention, the ILA relies on our cases indicating that pre-emption can be avoided if an individual's supervisory status has been determined "'with unclouded legal significance.'" *Hanna Mining Co.* v. *Marine Engineers,* 382 U. S. 181, 190 (1965) (quoting *Garmon,* 359 U. S., at 246). See also *Jones, supra,* at 680. It does not undertake any examination of Davis' duties as a ship superintendent. It makes no attempt to show that Davis was more like an employee than a supervisor as those terms are defined in §§2(1) and (11) of the Act, 29 U. S. C. §§152(1) and (11).[13] It points to no evidence in the record indicating that Davis was not a supervisor. It does not argue that Davis' job was different from Trione's or that the Regional Director was wrong in finding that Trione was a supervisor. Its sole submission is that Davis was arguably an employee because the Board has not decided that he was a supervisor.

We cannot agree that Davis' arguable status as a supervisor is made out by the mere fact that the Board has not finally determined his status. The lack of a Board decision in no way suggests how it would or could decide the case if it had the opportunity to do so. To accept the Union's submission would be essentially equivalent to allowing a conclusory claim of pre-emption and would effectively eliminate the necessity to make out an arguable case. The better view is that those claiming pre-emption must carry the burden of showing at least an arguable case before the jurisdiction of a state court will be ousted.

Moreover, neither *Garmon* nor *Hanna Mining* supports the Union's position. *Garmon* itself is the source of the arguably protected or prohibited standard for pre-emption. The Court stated, 359 U. S., at 244:

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by

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[13] Whether a particular employee is a supervisor under the Act depends on his or her actual duties, not on his or her title or job classification. See, *e. g., Winco Petroleum Co.,* 241 N. L. R. B. 1118, 101 LRRM 1100 (1979).

> § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of the federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law."

Later the Court said: "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence" of the Board. *Id.*, at 245. Of course, the Court explained, the Board might decide the case one way or the other, but in the "absence of the Board's clear determination that an activity is neither protected or prohibited," *id.*, at 246, it is not for the courts to decide the case. It is apparent from these passages that a court first must decide whether there is an arguable case for pre-emption; if there is, it must defer to the Board, and only if the Board decides that the conduct is not protected or prohibited may the court entertain the litigation. Nothing in *Garmon* suggests that an arguable case for pre-emption is made out simply because the Board has not decided the general issue one way or the other.

Hanna Mining also does nothing for the Union's submission. The Court there, relying on *Garmon*, held that there was no pre-emption because the Board or its General Counsel had in fact adversely decided the issues on which the claim of pre-emption rested. Obviously, no inference may be drawn from that decision that a party makes out a case for preemption by merely asserting that the issue involved has not been decided by the Board. The Union's position is also negated by *Interlake S.S. Co.*, *supra*, where the Court found pre-emption only after examining the facts and deciding "whether the evidence in this case was sufficient to show that either of [the organizations] was arguably a 'labor organization' within the contemplation of § 8(b)." *Id.*, at 178. The Court went on to hold that while there was persuasive evidence that the marine engineers were supervisors, the Board had nevertheless effectively decided that the union involved was a labor organization within the meaning of the Act. While agreeing with the principles announced by the Court, Justice Douglas dissented because he had a different view of the facts of the case. Consequently, a party asserting pre-emption must put forth enough evidence to enable a court to conclude that the activity is arguably subject to the Act.

Here, the Union points to no evidence in support of its assertion that Davis was arguably an employee. The Union's claim of pre-emption in the state courts was also devoid of any factual or legal showing that Davis was arguably not a supervisor but an employee. In this respect, its brief in the Alabama Supreme Court was similar to its brief here, and its post-trial motion for judgment in the trial court contained no more than a conclusory assertion that state jurisdiction was pre-empted. Until that motion, no claim of pre-emption had been made out, but whether Davis was a supervisor or an employee was a relevant inquiry in making out his case. He alleged in his complaint that he was a supervisor. The Union answered that it was without sufficient information to form a belief as to whether or not he was. Moreover, in moving for summary judgment or for directed verdict at the close of Davis' case and at the close of all the evidence the Union did not assert that Davis was an employee, not a supervisor, let alone point to any evidence to support such a claim.[14] In sum, the Union has not met its burden of showing that the conduct here was arguably subject to the Act.

IV

We hold that where state law is pre-empted by the NLRA under *Garmon* and our subsequent cases, the state courts lack the very power to adjudicate the claims that trigger pre-emption. Thus, the Alabama Supreme Court's holding that the ILA had waived its pre-emption claim by noncompliance with state procedural rules governing affirmative defenses did not present an independent and adequate state ground supporting the judgment below, and that court erred in declining to address that claim on the merits. On the merits, we reject the ILA's characterization of our prior cases as holding that the mere lack of a conclusive determination by the Board that an activity is without the purview of the Act renders that activity arguably subject to the Act. Rather, we reaffirm our previously expressed view that the party asserting pre-emption must make an affirmative showing that the activity is arguably subject to the Act and we therefore affirm the judgment of the Alabama Supreme Court.

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[14] Although it is not our task *sua sponte* to search the record for evidence to support the Union's pre-emption claim, we find nothing in the record to make out even a colorable case for holding that Davis was not a supervisor.

So ordered.

JUSTICE REHNQUIST, with whom JUSTICE POWELL, JUSTICE STEVENS, and JUSTICE O'CONNOR join, concurring in part and concurring in the judgment.

The Court holds that appellant Union's federal pre-emption claim must be considered on the merits by Alabama courts even though the Union never once raised the claim in the Alabama trial court until a post-trial motion following an adverse jury verdict. By allowing a defendant to save its preemption claim until after it sees the verdict, this ruling poses a sufficient threat to orderly judicial proceedings that it can be justified only if Congress has mandated such a result. Because Congress clearly has not mandated any such result, I disagree with Part II of the Court's opinion.

Appellee Davis sued the Union in the Circuit Court of Mobile County alleging fraud and misrepresentation. Davis had been first a trainee ship superintendent and then a ship superintendent in the employ of Ryan-Walsh Stevedoring Co. in Mobile. Although the ship superintendents were theoretically superior to the longshoremen, they were paid less salary and their compensation was generally lower than that of the longshoremen, who worked for hourly wages.

One of Davis' fellow ship superintendents contacted the Union to see about the possibility of organizing the superintendents and affiliating with the Union. At a meeting of the superintendents to discuss that possibility, several of them expressed a fear of being discharged for participating in union-related activities. Testimony at trial indicated that one Benny Holland, a union representative, had assured the superintendents that the Union would get them their jobs back with backpay if they were discharged. As a result of the meeting, a number of the ship superintendents including Davis signed pledge cards and an application for a union charter from the ILA.

Sure enough, first another superintendent and then Davis were discharged by Ryan-Walsh, and the Union did not succeed in getting them their jobs back, with or without backpay. Davis then filed this suit, which the Union defended on the merits throughout the trial; at the conclusion of the trial the jury returned a verdict in Davis' favor for $75,000. Only at this point, in a motion for judgment notwithstanding the verdict, did the Union first raise its pre-emption claim, a technique that the Court now sanctions.

The Supreme Court of Alabama refused to consider the claim, observing that Alabama Circuit Courts are courts of general jurisdiction having authority to try, *inter alia*, cases involving fraud and misrepresentation. That court held that the Union's pre-emption claim was an affirmative defense under the Alabama Rules of Civil Procedure, and had to be affirmatively pleaded in order to be considered. I agree with this Court that Congress could, if it wished, forbid Alabama to impose any such procedural rule, but I am convinced that Congress has done no such thing.

The Court relies on what it apparently considers to be the similar case of *Kalb* v. *Feuerstein*, 308 U. S. 433 (1940). There Congress *did* provide quite explicitly that state courts should be deprived of jurisdiction in cases where mortgage foreclosure proceedings in those courts were also the subject of a petition in bankruptcy in federal court. Congress said:

> "'(o) Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted, or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court:
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> . . . . .
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> "'(2) proceedings for foreclosure of a mortgage on land . . . or for recovery of possession of land.'" *Id.*, at 440–441 (quoting Frazier-Lemke Act) (emphasis deleted).

In the present case, by contrast, Congress has never said a word about pre-emption of state-court jurisdiction. This Court, in a long line of cases beginning with *Garner* v. *Teamsters*, 346 U. S. 485 (1953), has enunciated a judicial doctrine of pre-emption in labor relations cases based on the implied intent of Congress. But as the Court noted in *Garner:*

> "The national Labor Management Relations Act, as we have before pointed out, leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible." *Id.*, at 488 (footnote omitted).

Thus when the Court speaks of the pre-emption of "subject-matter jurisdiction" here, it must rely on a far more dimly refracted version of congressional intent than did the *Kalb* Court: not what Congress said, but what this Court thinks Congress might have said had it been confronted with the situation. This is far too thin a reed to support the perverse application of the doctrine in the present case.

The Court also places undue reliance upon its opinion in *Construction Laborers* v. *Curry*, 371 U. S. 542 (1963). There the claim of federal pre-emption had been properly presented by the union at every stage of Georgia proceedings. This Court, on direct review of a judgment of the Supreme Court of Georgia, held that Congress had denied to the Georgia courts the authority to issue an injunction because the matter was "within the exclusive powers of the National Labor Relations Board." *Id.*, at 546–547. The Court's opinion in *Curry* refers to state-court "jurisdiction," but as Justice Frankfurter explained, "the term 'jurisdiction' . . . is a verbal coat of . . . many colors." *United States* v. *Tucker Truck Lines, Inc.*, 344 U. S. 33, 39 (1952) (dissenting opinion). The Court's opinion today implicitly suggests that the word "jurisdiction" is to lawyers what a term like *Bombycilla cedrorum* (cedar waxwing) is to ornithologists: a description of one and only one particular species recognized throughout the world. We all know that the term "jurisdiction" does not partake of that specialized a meaning.

Nothing in *Curry*, and certainly nothing in *Kalb*, foreordains the result in this case. State-court judges and trial courts of general jurisdiction in Alabama and in the other 49 States are experts primarily in state law, not federal law. Indeed, with the advancing march of federal legislation in areas heretofore left to state law, it would be an impossible task for any judge—federal or state—to keep abreast of the various areas in which there might be federal pre-emption. Here Alabama, by application of a neutral statute with a precise counterpart in the Federal Rules of Civil Procedure, has said that a defendant who wishes to claim federal pre-emption as a defense to state-court exercise of jurisdiction may not wait to raise that claim until after the case has gone to verdict. The Court, saying otherwise, allows a sophisticated defendant as in the present case to gamble on obtaining a favorable verdict and raise a pre-emption defense only if it loses on the merits. To me this result defies common sense; if Congress had ordained it, I would reach it albeit with reluctance. But it is this Court, not Congress, that has ordained the result. I believe the Court is mistaken in doing so, and I therefore cannot join Part II of its opinion.

Having concluded that National Labor Relations Act pre-emption is "jurisdictional," and hence may be raised at any time, the Court goes on to decide that the Union has not carried its burden of showing that the conduct at issue here was "arguably" protected or prohibited by the Act. With this I agree. Accordingly, I join Parts I and III of the Court's opinion and concur in the judgment.

JUSTICE BLACKMUN, concurring in part and dissenting in part.

The Court today reaffirms that a pre-empted cause of action, as defined in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), is a claim that a state court is without power to adjudicate. *Ante*, at 393. I fully agree, and therefore join Parts I and II of the Court's opinion. But I believe that the standard enunciated in Part III to determine the pre-emption *vel non* of a particular cause of action is erroneous, as well as at odds with the principles and policies of *Garmon*. I therefore dissent from Part III of the Court's opinion and from its judgment.

In *Garmon*, this Court held that when an activity is protected or prohibited by the Act, or arguably protected or prohibited, courts must defer to the exclusive competence of the National Labor Relations Board. *Id.*, at 245. In the absence of the Board's clear determination that an activity is neither protected nor prohibited, nor arguably so, courts must stay their hand. "[W]hether federal law *does* apply is to be decided" by the Board. *Taggart* v. *Weinacker's, Inc.*, 397 U. S. 223, 229 (1970) (separate memorandum of Harlan, J.) (emphasis added). The Court today purports to follow *Garmon*, but nonetheless requires that the party "claiming pre-emption must carry the burden of showing at least an arguable case before the jurisdiction of a state court will be ousted," *ante*, at 396, and proceeds to require here that the Union make a showing "sufficient to permit the Board to find that Davis was an employee, not a supervisor." *Ante*, at 395. In transforming the notion that some activities are *arguably* protected or prohibited into a requirement that a party claiming pre-emption make out an "arguable case," *ante*, at 396, it seems to me that the Court misses the point of its decision in *Garmon*. As a result of the decision today, a court, under the guise of weighing the sufficiency of the evidence, will be making precisely the determination that *Garmon* makes clear is for the Board, and only the Board, to make.

To understand how far the Court strays from the practical and congressionally mandated standard articulated in *Garmon*, it is sufficient to look to the basis of the broad pre-emption doctrine. Under the Act, some activities are protected and some are prohibited; other activities are subject to state regulation, while still others, not at issue in this case, are to be left unregulated by both federal and state authorities. Thus, the determination of whether an activity falls within the sphere of protected or prohibited is the crucial question under federal law, and one which this Court recognized is not always an easy determination to make. *Garmon*, 359 U. S., at 244. Accordingly, Congress deprived state courts of jurisdiction over actually or arguably protected or prohibited conduct and "confide[d] primary interpretation and application of its rules to a specific and specially constituted tribunal," thereby ensuring that the federal scheme would be administered uniformly with the wisdom and insight resulting from specialized expertise and experience. *Garner* v. *Teamsters*, 346 U. S. 485, 490 (1953), quoted in *Garmon*, 359 U. S., at 242.[1] Permitting courts to determine whether activity is protected or prohibited could result in a court's finding unlawful an activity that the Board might embrace as lawful.

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[1] Justice Harlan, whose concurrence in *Garmon* indicated his initial hesitancy to accept its categorical treatment of particular claims, came to embrace its approach, recognizing that any other would require this Court, as

In an attempt to garner support for its holding, the Court relies on *Marine Engineers* v. *Interlake S.S. Co.*, 370 U. S. 173, 184 (1962). Such reliance is misplaced. Indeed, in *Interlake* the Court reaffirmed *Garmon*, recognizing that the definition of "labor organization," like the definition of "supervisor," is "of a kind most wisely entrusted initially to the agency charged with the day-to-day administration of the Act as a whole." 370 U. S., at 180. In *Interlake*, this Court held that only the Board could determine whether the union met the statutory definition of a "labor organization."

The Court in *Interlake*, in dicta, then reviewed the evidence that was presented. Such evidence was certainly not intended to be held up as the benchmark of the showing required successfully to claim that an activity is *arguably* protected; the Court made clear that that evidence was sufficient to show that the conduct was *actually* protected:

> "This was a case, therefore, where a state court was shown not simply the arguable possibility of Labor Board jurisdiction over the controversy before it, but that *the Board had actually determined* the underlying issue upon which its jurisdiction depended" (emphasis added). *Id.*, at 184.[2]

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the final court of review, to monitor every case in which a pre-emption claim is raised:

"Nor can we proceed on a case-by-case basis to determine whether each particular final judicial pronouncement does, or might reasonably be thought to, conflict in some relevant manner with federal labor policy. This Court is ill-equipped to play such a role and the federal system dictates that this problem be solved with a rule capable of relatively easy application, so that lower courts may largely police themselves in this regard." *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274, 289–290 (1971).

[2] Similarly, the fact that the Board had asserted jurisdiction over the unions in *Interlake*, at the time the state-court case was pending, is not an indication of the standard of "arguably," because that evidence "was *more*

Thus, in *Interlake*, the Court was presented with actual determinations by the Board; under *Garmon* that is the only kind of showing sufficient to take the pre-emption decision out of the hands of the Board.

The present case underscores the signal merit of *Garmon*.[3] Davis was fired for union activities. According to Davis, he was assured by the Union that, if fired, he could obtain reinstatement. Davis' ability to obtain reinstatement turns on whether Davis is a supervisor. If Davis is a supervisor, the Act would not protect him against retaliatory actions by his

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than sufficient to create an arguable case" (emphasis supplied), 370 U. S., at 182, n. 16, even though the unions had consistently advanced the position before the Board that they were not organizations within the meaning of the Act.

[3] To be sure, the *Garmon* universe is not without imperfection. JUSTICE WHITE has long sought to eliminate the "arguably protected" coverage of *Garmon* pre-emption. See, *e. g.*, *Lockridge*, 403 U. S., at 325–332 (WHITE, J., dissenting); *Longshoremen* v. *Ariadne Shipping Co.*, 397 U. S. 195, 201 (1970) (WHITE, J., concurring). In *Sears, Roebuck & Co.* v. *Carpenters*, 436 U. S. 180 (1978), the Court addressed what I believe was at the heart of JUSTICE WHITE's opposition to "arguably protected." There the Court acknowledged an exception to *Garmon* pre-emption for conduct that is arguably protected where the injured party has no means of bringing the dispute before the Board. The opinion today speaks of a broader opposition to "arguably protected," as its effect in this case is to expand the *Sears* exception to encompass a case where the injured party, here Davis, does have the means of bringing the dispute before the Board. Apparently seeking to eliminate "arguably protected," but unable to do so directly, JUSTICE WHITE establishes a standard that is nearly as effective. Justice Harlan, speaking for the Court in *Lockridge* and responding to those who sought to weaken *Garmon*, provides the answer to JUSTICE WHITE today:

"[A]lthough largely of judicial making, the labor relations pre-emption doctrine finds its basic justification in the presumed intent of Congress. While we do not assert that the *Garmon* doctrine is without imperfection, we do think that it is founded on reasoned principle and that until it is altered by congressional action or by judicial insights that are born of further experience with it, a heavy burden rests upon those who would, at this late date, ask this Court to abandon *Garmon* and set out again in quest of a system more nearly perfect." 403 U. S., at 302.

employer based on his union activities and Davis' suit would be cognizable in state court for the Union's alleged intentional misrepresentation. However, if Davis is not a supervisor, the employer would have committed an unfair labor practice in firing him, and Davis would be entitled to redress by the Board. Thus, the issue here falls within the rubric of "arguably"—the conduct at issue is arguably protected because Davis may be a statutory employee, not a supervisor.[4]

The crucial question then was whether Davis was a supervisor. The task of identifying supervisors is an "aging but nevertheless persistently vexing problem." *NLRB* v. *Security Guard Service, Inc.*, 384 F. 2d 143, 145 (CA5 1967). Supervisory status is an inherently fact-specific determination that turns on an individual's duties, not job title or classification. See, *e. g.*, *Winco Petroleum Co.*, 241 N. L. R. B. 1118 (1979) (giving an employee the title "supervisor" or even theoretical power to perform some supervisory functions does not convert a rank-and-file employee into a statutory supervisor); *Pattern Makers Assn.*, 199 N. L. R. B. 96 (1972) (shop foreman with supervisory authority who worked with tools 40% of his time was supervisor despite contract which defined supervisory employees as persons who did not work with tools of trade). It is precisely because of the difficulty in assessing the statutory supervisory status of an individual, and the need for uniformity in the interpretation of the federal labor laws, that this Court, in *Hanna Mining Co.* v. *Ma-*

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[4] In the ordinary case, since a determination of pre-emption poses a jurisdictional bar to a court's adjudication of the merits of a suit, a defendant claiming pre-emption will do so at the threshold, usually in a motion to dismiss. Thus, courts will be called upon to determine pre-emption before facts have been developed or discovery has occurred. This poses a difficult burden for a defendant required, under today's decision, to present a factual showing. If a fair reading of the complaint leads to a possibility that the activity complained of may be protected or prohibited, then the case falls squarely within the reach of "arguably protected," and the state court lacks jurisdiction over the dispute. See *Construction Laborers* v. *Curry*, 371 U. S. 542, 546 (1963).

rine Engineers, 382 U. S. 181 (1965), held that state law can be applied only if the supervisory status of the individuals in question "has been settled with unclouded legal significance."[5] *Id.*, at 190. The supervisory status of Davis has never been settled by the Board.

Thus, in asserting that Davis was arguably a supervisor, the Union "advance[d] an interpretation of the Act that is not plainly contrary to its language and that has not been 'authoritatively rejected' by the courts or the Board." *Ante*, at 395, quoting *Interlake*, 370 U. S., at 184. That is the only kind of showing that is properly required under *Garmon*.[6]

I therefore dissent from Part III of the Court's opinion and from its judgment.

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[5] There is indeed a cloud over Davis' status. As a "ship superintendent," Davis performs the same functions as workers called "walking foremen" in Houston, Tex. We are advised that the Houston walking foremen formed a union and are covered by a collective-bargaining agreement. See Juris. Statement 4, n. 3.

[6] In establishing the new standard, JUSTICE WHITE is joined by the four Justices who dissent from the Court's holding that pre-emption goes to subject-matter jurisdiction. These four would hold that pre-emption is merely a defense. Because, under Alabama law, a defense that is not raised during trial is deemed waived, see *ante*, at 386, n. 7, the view of these four Justices means that the decision of the Alabama Supreme Court rested on an independent and adequate state ground, see *ante*, at 388–389, ineluctably leading to the conclusion that this Court is without jurisdiction over this case. Rather than stating that they would dismiss for want of jurisdiction, however, those Members of the Court reach out to join Part III of JUSTICE WHITE's opinion.

SQUARE D CO. ET AL. *v.* NIAGARA FRONTIER TARIFF BUREAU, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 85–21. Argued March 3, 1986—Decided May 27, 1986

Petitioner shippers brought class actions in Federal District Court against respondent motor carriers and respondent ratemaking bureau, alleging that during the years 1966 through 1981 respondents engaged in a conspiracy, in violation of the Sherman Act, to fix rates for transporting freight between the United States and Canada without complying with an agreement filed by the bureau with, and approved by, the Interstate Commerce Commission. Petitioners sought treble damages, measured by the difference between the allegedly higher rates they paid and the rates they would have paid in a freely competitive market, and also sought declaratory and injunctive relief. The District Court dismissed the complaints on the authority of *Keogh* v. *Chicago & Northwestern R. Co.*, 260 U. S. 156, wherein it was held that a private shipper could not recover treble damages under § 7 of the Sherman Act in connection with ICC-filed tariffs. The Court of Appeals affirmed the dismissal as to the treble-damages claims.

Held: Petitioners are not entitled to bring a treble-damages antitrust action. *Keogh, supra.* Pp. 415–423.

(a) Nothing in the Reed-Bulwinkle Act or in its legislative history indicates that Congress intended to change or supplant the *Keogh* rule. Similarly, there is no evidence that Congress in enacting the Motor Carrier Act of 1980 intended to change the *Keogh* rule. And cases like *Carnation Co.* v. *Pacific Westbound Conference*, 383 U. S. 213, emphasizing the necessity to strictly construe immunity of collective ratemaking activities from antitrust laws, do not render *Keogh* invalid. Pp. 417–422.

(b) The various developments that have occurred since *Keogh*—the development of class actions, the emergence of precedents permitting treble damages even when there is an available regulatory remedy, greater sophistication in evaluating damages, and the development of procedures in which judicial proceedings can be stayed pending regulatory proceedings—are insufficient to overcome the strong presumption of continued validity that adheres in the judicial interpretation of a statute. P. 423.

760 F. 2d 1347, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, *post*, p. 424.

Douglas V. Rigler argued the cause for petitioners. With him on the briefs were *Linda Heller Kamm*, *Michael Fischer*, *Joseph E. Zdarsky*, *H. Laddie Montague*, *Arnold Levin*, and *Howard Sedran*.

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Fried*, *Assistant Attorney General Ginsburg*, *Deputy Assistant Attorney General Cannon*, *Jerrold J. Ganzfried*, *Robert B. Nicholson*, *Robert S. Burk*, *Henri F. Rush*, *Timm L. Abendroth*, and *Jim J. Marquez*.

Donald L. Flexner argued the cause for respondents. With him on the brief were *Clifton S. Elgarten*, *Peter A. Greene*, *Charles L. Freed*, *John W. Bryant*, *Bryce Rea, Jr.*, *Donald E. Cross*, *Lester M. Bridgeman*, *Louis E. Emery*, and *Joel B. Harris*.*

JUSTICE STEVENS delivered the opinion for the Court.

Petitioners have alleged that rates filed with the Interstate Commerce Commission by respondent motor carriers during the years 1966 through 1981 were fixed pursuant to an agreement forbidden by the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1 *et seq.* The question presented is whether the carriers are subject to treble-damages liability in a private antitrust action if the allegation is true.

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*Briefs of *amici curiae* urging affirmance were filed for the Association of American Railroads by *Richard T. Conway*, *Ralph J. Moore, Jr.*, *John Townsend Rich*, *Stephen J. Hadley*, and *Kenneth P. Kolson;* and for the National Motor Freight Traffic Association, Inc., et al. by *Patrick McEligot*, *William W. Pugh*, and *Kevin M. Williams*.

Briefs of *amici curiae* were filed for American Information Technologies Corp. et al. by *J. Paul McGrath;* for C. D. Ambrosia Trucking Co., Inc., et al. by *Lawrence R. Velvel* and *Bruce J. Ennis, Jr.;* and for the Western Fuels Association, Inc., et al. by *Frederick L. Miller, Jr.*

The question requires us to give careful consideration to the way in which Congress has accommodated the sometimes conflicting policies of the antitrust laws and the Interstate Commerce Act, 49 U. S. C. § 10101 *et seq.* (1982 ed. and Supp. II). Our analysis of the question will include three components: (1) the sufficiency of the complaint allegations in light of the bare language of the relevant statutes; (2) the impact of the Court's decision of an analogous question in 1922 in *Keogh* v. *Chicago & Northwestern R. Co.*, 260 U. S. 156; and (3) the extent to which the rule of the *Keogh* case remains part of our law today.

I

Two class-action complaints making parallel allegations against the same six defendants were filed in the United States District Court for the District of Columbia and then transferred to Buffalo, New York, where a similar action brought by the United States was pending. The Government case was ultimately settled by the entry of a consent decree;[1] after the two private actions had been consolidated, the District Court granted a motion to dismiss the complaints. We therefore take the well-pleaded facts as true.[2]

Five of the respondents are Canadian motor carriers engaged in the transportation of freight between the United States and Canada. They are subject to regulation by the Ontario Highway Transport Board, and by the Interstate

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[1] The consent decree enjoins respondents from "harassing, discouraging, coercing, or threatening in any way any motor carrier to withdraw, forbear from filing, or modify in any way said carrier's planned or actual independent rates," and from discussing rates except "within an authorized ratemaking body of a rate bureau with a rate agreement." *United States* v. *Niagara Frontier Tariff Bureau, Inc.*, 1984–2 Trade Cases ¶ 66,167, pp. 66,533–66,535 (WDNY 1984).

[2] See *Hishon* v. *King & Spalding*, 467 U. S. 69, 73 (1984); *McLain* v. *Real Estate Bd. of New Orleans*, 444 U. S. 232, 246 (1980); *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U. S. 738, 746 (1976); *Scheuer* v. *Rhodes*, 416 U. S. 232, 236 (1974); *Conley* v. *Gibson*, 355 U. S. 41, 45–46 (1957).

Commerce Commission (ICC). They are all members of the Niagara Frontier Tariff Bureau, Inc. (NFTB), which is also a defendant. NFTB is a nonprofit corporation organized to engage in collective ratemaking activities pursuant to an agreement filed with and approved by the ICC.[3]

Petitioners are corporations that have utilized respondents' services to ship goods between the United States and Canada for many years. In their complaints, they allege that, at least as early as 1966 and continuing at least into 1981, respondents engaged in a conspiracy "to fix, raise and maintain prices and to inhibit or eliminate competition for the transportation of freight by motor carrier between the United States and the Province of Ontario, Canada without complying with the terms of the NFTB agreement and by otherwise engaging in conduct that either was not or could not be approved by the ICC."[4]

The complaints allege five specific actions in furtherance of this conspiracy. First, senior management officials of the NFTB used a "Principals Committee," which was not authorized by the NFTB agreement, to set rates and to inhibit competition.[5] Second, respondents set and controlled NFTB rate levels without complying with the notice, publication, public hearing, and recordkeeping requirements of the NFTB agreement and ICC regulations.[6] Third, respondents planned threats, retaliation, and coercion against NFTB members to inhibit independent actions.[7] Fourth, respondents actually used pressures, threats, and retaliation to interfere with independent actions.[8] Finally, still in furtherance of the conspiracy, respondents filed tariffs with the ICC.[9]

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[3] See *Niagara Frontier Tariff Bureau, Inc.—Agreement*, 297 I. C. C. 494 (1955).

[4] Square D complaint, ¶22, App. 11; Big D complaint, ¶19, App. 24.

[5] Square D complaint, ¶23(a), App. 12; Big D complaint, ¶20(a), App. 24.

[6] Square D complaint, ¶23(b), App. 12; Big D complaint, ¶20(b), App. 24.

[7] Square D complaint, ¶23(c), App. 12; Big D complaint, ¶20(c), App. 24.

Because of respondents' unlawful conduct, the complaints continue, petitioners and the members of the large class of shippers that they represent have paid higher rates for motor carrier freight transport than they would have paid in a freely competitive market.[10] They seek treble damages measured by that difference, as well as declaratory and injunctive relief.

The legal theory of the complaints is that respondents' conspiracy is not exempted from a private antitrust, treble-damages action even though the rates that respondents charged were filed with the ICC, as required by law. The complaints note that the ICC requires motor carriers to file tariffs containing all their rates, to make the tariffs available for public inspection, and to give advance notice of any changes in the filed rates.[11] Although the ICC has the power to determine those rates, the rates are set by the carriers, not the ICC, in the first instance.[12] The Reed-Bulwinkle Act, enacted in 1948, expressly authorizes the ICC to grant approval to agreements establishing rate bureaus for the purpose of setting rates collectively.[13] The joint setting of rates pursuant to such agreements is exempted from the antitrust laws, but the statute strictly limits the exemption to actions that conform to the terms of the agreement approved by the

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[8] Square D complaint, ¶23(d), App. 12; Big D complaint, ¶20(d), App. 25.

[9] Square D complaint, ¶23(e), App. 12; Big D complaint, ¶20(e), App. 25.

[10] Square D complaint, ¶¶24(a)–(d), App. 12–13; Big D complaint, ¶¶21(a)–(c), App. 25.

[11] Square D complaint, ¶16, App. 9 (citing 49 U. S. C. § 10762); Big D complaint, ¶13, App. 22 (same).

[12] Square D complaint, ¶16, App. 9 (citing 49 U. S. C. § 10704); Big D complaint, ¶13, App. 22 (same).

[13] Square D complaint, ¶17, App. 10 (citing 49 U. S. C. § 5b, now codified at 49 U. S. C. § 10706(b)(2)); Big D complaint, ¶14, App. 22 (same).

ICC.[14] In this case, according to the theory of the complaints, the activities of respondents were not authorized by the NFTB agreement; hence the alleged conspiracy was not exempt from the antitrust laws, and, indeed, blatantly violated those laws.

Under the plain language of the relevant statutes, it would appear that petitioners have alleged a valid antitrust action. The stated activities are clearly within the generally applicable language of the antitrust laws;[15] nothing in the language of the Interstate Commerce Act, moreover, necessarily precludes a private antitrust treble-damages remedy for actions that are not specifically immunized within the terms of the Reed-Bulwinkle Act.[16]

The District Court nevertheless dismissed the complaints on the authority of the *Keogh* case. 596 F. Supp. 153 (WDNY 1984). The Court of Appeals for the Second Circuit affirmed insofar as the District Court's judgment dismissed the claims for treble damages based on respondents' filed rates, but remanded for a further hearing to determine whether petitioners are entitled to injunctive relief and to give them an opportunity to amend their complaints to state possible claims for damages not arising from the filed tariffs. 760 F. 2d 1347 (1985). We granted certiorari to consider whether the rule of the *Keogh* case was correctly applied in barring a treble-damages action based on the filed tariffs, and, if so, whether that case should be overruled. 474 U. S. 815 (1985).

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[14] Under the Reed-Bulwinkle Act, as currently codified, "[i]f the [Interstate Commerce] Commission approves the agreement, it may be made and carried out under its terms and under the conditions required by the Commission, and the antitrust laws, as defined in the first section of the Clayton Act (15 U. S. C. 12), do not apply to parties and other persons with respect to making or carrying out the agreement." 49 U. S. C. § 10706(b)(2).

[15] See, *e. g.*, 15 U. S. C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal").

[16] See n. 14, *supra*.

II

In *Keogh*, as in this case, a shipper's complaint alleged that rates filed with the ICC by the defendants had been fixed pursuant to an agreement prohibited by the Sherman Act. The rates had been set by an agreement among executives of railroad companies "which would otherwise be competing carriers," 260 U. S., at 160. They were "higher than the rates would have been if competition had not been thus eliminated." *Ibid.* The shipper claimed treble damages measured by the difference between the rates set pursuant to agreement and those that had previously been in effect.

In their special plea, defendants averred that every rate complained of had been filed with the ICC and that, after hearings in which Keogh had participated, the rates had been approved by the Commission. That approval established that the fixed rates were "reasonable and non-discriminatory," *id.*, at 161, but it did not foreclose the possibility that slightly lower rates would also have been within the zone of reasonableness that the Commission would also have found lawful under the Interstate Commerce Act. Nor did the ICC's approval require rejection of Keogh's contention that the combination among the railroads violated the Sherman Act.[17] The Court nevertheless held that Keogh, a private shipper, could not "recover damages under § 7 because he lost the benefit of rates still lower, which, but for the conspiracy, he would have enjoyed." *Id.*, at 162.

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[17] "All the rates fixed were reasonable and non-discriminatory. That was settled by the proceedings before the Commission. *Los Angeles Switching Case*, 234 U. S. 294. But under the Anti-Trust Act, a combination of carriers to fix reasonable and non-discriminatory rates may be illegal; and if so, the Government may have redress by criminal proceedings under § 3, by injunction under § 4, and by forfeiture under § 6. That was settled by *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, and *United States* v. *Joint Traffic Association*, 171 U. S. 505. The fact that these rates had been approved by the Commission would not, it seems, bar proceedings by the Government." 260 U. S., at 161–162.

The Court reasoned that the ICC's approval had, in effect, established the lawfulness of the defendant's rates,[18] and that the legal right of the shippers against the carrier had to be measured by the published tariff. It therefore concluded that the shipper could not have been "injured in his business or property" within the meaning of § 7 of the Sherman Act by paying the carrier the rate that had been approved by the ICC. Justice Brandeis explained:

> "Section 7 of the Anti-Trust Act gives a right of action to one who has been 'injured in his business or property.' Injury implies violation of a legal right. The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The

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[18] "A rate is not necessarily illegal because it is the result of a conspiracy in restraint of trade in violation of the Anti-Trust Act. What rates are legal is determined by the Act to Regulate Commerce. Under § 8 of the latter act the exaction of any illegal rate makes the carrier liable to the 'person injured thereby for the full amount of damages sustained in consequence of any such violation' together with a reasonable attorney's fee. Sections 9 and 16 provide for the recovery of such damages either by complaint before the Commission or by an action in a federal court. If the conspiracy here complained of had resulted in rates which the Commission found to be illegal because unreasonably high or discriminatory, the full amount of the damages sustained, whatever their nature, would have been recoverable in such proceedings. *Louisville & Nashville R. R. Co.* v. *Ohio Valley Tie Co.*, 242 U. S. 288. Can it be that Congress intended to provide the shipper, from whom illegal rates have been exacted, with an additional remedy under the Anti-Trust Act? See *Meeker* v. *Lehigh Valley R. R. Co.*, 162 Fed. 354. And if no remedy under the Anti-Trust Law is given where the injury results from the fixing of rates which are illegal, because too high or discriminatory, may it be assumed that Congress intended to give such a remedy where, as here, the rates complained of have been found by the Commission to be legal and while in force had to be collected by the carrier?" *Id.*, at 162.

> rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier. *Texas & Pacific R. R. Co.* v. *Mugg,* 202 U. S. 242; *Louisville & Nashville R. R. Co.* v. *Maxwell,* 237 U. S. 94; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Robinson,* 233 U. S. 173; *Dayton Iron Co.* v. *Cincinnati, New Orleans & Texas Pacific Ry. Co.,* 239 U. S. 446; *Erie R. R. Co.* v. *Stone,* 244 U. S. 332. And they are not affected by the tort of a third party. Compare *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Fink,* 250 U. S. 577. This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated." *Id.,* at 163.

In this case, unlike *Keogh,* respondents' rates, established in the tariffs that had been filed with the ICC, were not challenged in a formal ICC hearing before they were allowed to go into effect. They were, however, duly submitted, lawful rates under the Interstate Commerce Act in the same sense that the rates filed in *Keogh* were lawful. Under the Court's holding in that case, it therefore follows that petitioners may not bring a treble-damages antitrust action.[19] The question, then, is whether we should continue to respect the rule of *Keogh.*

III

Petitioners, supported by the Solicitor General of the United States, ask us to overrule *Keogh.* They submit that

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[19] In their brief, petitioners argue that, even under *Keogh,* their treble-damages action should not have been dismissed because there was no ICC hearing in this case and because *Keogh* did not involve allegations of the type of covert legal violations at issue here. Brief for Petitioners 10–11. The Court of Appeals, however, properly concluded that *Keogh* was not susceptible to such a narrow reading: "Rather than limiting its holding to cases where, as in *Keogh,* rates had been investigated and approved by the ICC, the Court said broadly that shippers could not recover treble-damages for overcharges whenever tariffs have been filed." 760 F. 2d, at 1351.

Keogh was implicitly rejected in the Reed-Bulwinkle Act and in the Motor Carrier Act of 1980, Pub. L. 96–296, 94 Stat. 793; that *Keogh* in effect created an implied immunity from the antitrust laws and that its reasoning is thus inconsistent with later cases, particularly *Carnation Co.* v. *Pacific Westbound Conference*, 383 U. S. 213 (1966); and that the rationales of the *Keogh* decision are no longer valid.

Petitioners argue that the Reed-Bulwinkle Act, by delineating an antitrust immunity for specific ratemaking activities,[20] repudiated *Keogh*'s holding that shippers may not bring treble-damages actions in connection with ICC-filed tariffs. In our view, however, it is not proper to read that statute as supplanting the *Keogh* rule with a narrow, express exemption from the antitrust laws.

The legislative history of Reed-Bulwinkle explains that it was enacted, at least in part, in response to this Court's decision in *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439 (1945).[21] In that case, after restating the holding in *Keogh*, the Court held that, although Georgia could not maintain a suit under the antitrust laws to obtain damages, it could obtain injunctive relief against the collective ratemaking procedures employed by the railroads.[22] The Reed-Bulwinkle Act thus created an absolute immunity from the antitrust laws for approved collective ratemaking activities.

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[20] See ch. 491, 62 Stat. 472, now codified at 49 U. S. C. § 10706(b).

[21] See, *e. g.*, H. R. Rep. No. 1100, 80th Cong., 1st Sess., 4 (1947) (citing "[t]he Georgia suit" and other cases, and emphasizing "[t]hese developments have caused grave concern among all those having direct interest in transportation, who see in the situation a threat to long-standing practices in the transportation industry that were developed in cooperation with the shippers and have proved their worth"). See also 760 F. 2d, at 1356–1360 (reviewing legislative history of Reed-Bulwinkle Act).

[22] "We think it is clear from the *Keogh* case alone that Georgia may not recover damages even if the conspiracy alleged were shown to exist. That was a suit for damages under § 7 of the Sherman Act. 26 Stat. 210. The Court recognized that although the rates fixed had been found reasonable and non-discriminatory by the Commission, the United States was not barred from enforcing the remedies of the Sherman Act. 260 U. S. pp. 161–162. It held, however, that for purposes of a suit for damages a rate was not necessarily illegal because it was the result of a conspiracy in restraint of trade. The legal rights of a shipper against a carrier in re-

Nothing in the Act or in its legislative history, however, indicates that Congress intended to change or supplant the *Keogh* rule that other tariff-related claims, while subject to governmental and injunctive antitrust actions, did not give rise to treble-damages antitrust actions. On the contrary, the House Report expressly stated that, except for creating the new exemption, the bill left the antitrust laws applicable to carriers unchanged "so far as they are now applicable."[23] Particularly because the legislative history reveals clear congressional awareness of *Keogh*,[24] far from supporting petitioners' position, the fact that Congress specifically addressed this area and left *Keogh* undisturbed lends powerful support to *Keogh*'s continued viability.

Similarly, petitioners and the Solicitor General argue that private treble-damages actions would further the congressional policy of promoting competition in the transportation industry reflected in the Motor Carrier Act of 1980.[25] We

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spect to a rate are to be measured by the published tariff. That rate until suspended or set aside was for all purposes the legal rate as between shipper and carrier and may not be varied or enlarged either by the contract or tort of the carrier. . . . The reasoning and precedent of that case apply with full force here. But it does not dispose of the main prayer of the bill, stressed at the argument, which asks for relief by way of injunction." 324 U. S., at 453.

[23] "The bill here reported leaves the antitrust laws to apply with full force and effect to carriers, *so far as they are now applicable*, except as to such joint agreements or arrangements between them as may have been submitted to the Interstate Commerce Commission and approved by that body upon a finding that, by reason of furtherance of the national transportation policy as declared in the Interstate Commerce Act, relief from the antitrust laws should be granted." H. R. Rep. No. 1100, 80th Cong., 2d Sess., 5 (1947) (emphasis added).

[24] See 760 F. 2d, at 1359–1360 (reviewing attention to *Keogh* in the congressional consideration of the the Reed-Bulwinkle Act).

[25] As we recently pointed out, the "legislative history of the Act is clear that, beyond the bounds of immunity granted in § 10706(b)(3), Congress wanted the forces of competition to determine motor-carrier tariffs." *ICC* v. *American Trucking Assns., Inc.*, 467 U. S. 354, 367 (1984). See also

may assume that this is the case—indeed, we may assume that petitioners are correct in arguing that the *Keogh* decision was unwise as a matter of policy—but it nevertheless remains true that Congress must be presumed to have been fully cognizant of this interpretation of the statutory scheme,[26] which had been a significant part of our settled law for over half a century, and that Congress did not see fit to change it when Congress carefully reexamined this area of the law in 1980. Petitioners have pointed to no specific statutory provision or legislative history indicating a specific congressional intention to overturn the longstanding *Keogh* construction;[27] harmony with the general legislative purpose is inadequate for that formidable task.

Petitioners' reliance on *Carnation Co.* v. *Pacific Westbound Conference*, 383 U. S. 213 (1966), is also unavailing. In *Carnation*, a shipper of evaporated milk brought an antitrust treble-damages action against an association of shipping companies that had established higher rates for transportation between the west coast of the United States and the Philippine Islands. The defendants contended that the Shipping Act of 1916 had repealed all antitrust regulation of ratemaking activities in the shipping industry. Section 15 of the Shipping Act did create an express exemption for collective

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H. R. Rep. No. 96-1069, pp. 27-28 (1980); 126 Cong. Rec. 7777 (1980) (statement of Sen. Cannon).

[26] See *Cannon* v. *University of Chicago*, 441 U. S. 677, 696-697 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law"). See also *Director, OWCP* v. *Perini North River Associates*, 459 U. S. 297, 319 (1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353, 379 (1982); *Albernaz* v. *United States*, 450 U. S. 333, 341 (1981).

[27] The Motor Carrier Act did change the terms of the Reed-Bulwinkle Act in significant respects, see *ICC* v. *American Trucking Assns., Inc.*, 467 U. S., at 356-357, but it did not address the *Keogh* rule. For the same reasons that the creation of the Reed-Bulwinkle exemption did not affect *Keogh*, the reworking of that exemption in the Motor Carrier Act also did not affect the rule of that case.

ratemaking pursuant to agreements that had been approved by the Federal Maritime Commission, but the defendants had not obtained any such approval. They nevertheless contended that the structure of the entire Shipping Act, read against its legislative history, demonstrated an intent to free the ratemaking activities of the shipping industry from the antitrust laws. The Court unanimously rejected the argument, explaining:

> "We recently said: 'Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions.' *United States* v. *Philadelphia National Bank,* 374 U. S. 321, 350–351. We have long recognized that the antitrust laws represent a fundamental national economic policy and have therefore concluded that we cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry. We have, therefore, declined to construe special industry regulations as an implied repeal of the antitrust laws even when the regulatory statute did not contain an accommodation provision such as the exemption provisions of the Shipping and Agricultural Acts. See, *e. g., United States* v. *Philadelphia National Bank, supra.*" *Id.,* at 217–218.

Petitioners correctly point out that cases like *Carnation* make it clear that collective ratemaking activities are not immunized from antitrust scrutiny simply because they occur in a regulated industry, and that exemptions from the antitrust laws are strictly construed and strongly disfavored. Nevertheless, even if we agreed that *Keogh* should be viewed as an "antitrust immunity" case, we would not conclude that later cases emphasizing the necessity to strictly construe such immunity rendered *Keogh* invalid. For *Keogh* represents a longstanding statutory construction that Congress has consistently refused to disturb, even when revisiting this specific area of law.

We disagree, however, with petitioners' view that the issue in *Keogh* and in this case is properly characterized as an "immunity" question. The alleged collective activities of the defendants in both cases were subject to scrutiny under the antitrust laws by the Government and to possible criminal sanctions or equitable relief. *Keogh* simply held that an award of treble damages is not an available remedy for a private shipper claiming that the rate submitted to, and approved by, the ICC was the product of an antitrust violation. Such a holding is far different from the creation of an antitrust immunity,[28] and makes the challenge to *Keogh*'s role in the settled law of this area still more doubtful.[29]

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[28] In so characterizing the issue, we do not minimize the powerful role of the private treble-damages action in the structure of the Nation's antitrust laws. See, *e. g.*, *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 635 (1985) ("The treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators"). Granting this role its due respect, however, a critical distinction remains between an absolute immunity from *all* antitrust scrutiny and a far more limited nonavailability of the private treble-damages remedy. The consent decree in this case, n. 1, *supra*, as well as the unchallenged Court of Appeals decision to remand on the question of injunctive and declaratory relief for antitrust violations highlight this distinction: respondents' conduct has consistently been within the reach of the generally applicable antitrust laws.

[29] The specific *Keogh* holding, moreover, was not even implicated in *Carnation Co.* v. *Pacific Westbound Conference*, 383 U. S. 213 (1966), because the ratemaking agreements challenged in that case had not been approved by, or filed with, the Federal Maritime Commission. *Id.*, at 215. Indeed, the Shipping Act gives the Federal Maritime Commission far more limited authority over rates than the Interstate Commerce Act gives the ICC. See 760 F. 2d, at 1363 ("Although the [Federal Maritime Commission] can and does take effects on competition into account in approving conference agreements under 46 U. S. C. § 814, . . . the Shipping Act does not give the Commission any mandate to regulate *rate* competition and, indeed, the

Finally, petitioners point to various developments, discussed by the Court of Appeals, that seem to undermine some of the reasoning in Justice Brandeis' *Keogh* opinion—the development of class actions, which might alleviate the expressed concern about unfair rebates;[30] the emergence of precedents permitting treble-damages remedies even when there is a regulatory remedy available;[31] the greater sophistication in evaluating damages, which might mitigate the expressed fears about the speculative nature of such damages;[32] and the development of procedures in which judicial proceedings can be stayed pending regulatory proceedings.[33] Even if it is true that these developments cast Justice Brandeis' reasons in a different light, however, it is also true that the *Keogh* rule has been an established guidepost at the intersection of the antitrust and interstate commerce statutory regimes for some 6½ decades. The emergence of subsequent procedural and judicial developments does not minimize *Keogh*'s role as an essential element of the settled legal context in which Congress has repeatedly acted in this area.

IV

The Court of Appeals, in Judge Friendly's characteristically thoughtful and incisive opinion, suggested that, in view

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statutory scheme was designed to minimize the role of the FMC in this regard").

[30] See *id.*, at 1352 (discussing development of class actions in view of the *Keogh* concern about antitrust litigation operating as a discriminatory rebate).

[31] See *id.*, at 1354 (noting that "[t]he Court has subsequently found that activity could be challenged under the antitrust laws despite the existence of an administrative agency with authority to regulate the activity").

[32] See *id.*, at 1353 ("The Supreme Court has . . . rejected the argument that a plaintiff cannot recover damages it was able to pass on to its customers in the antitrust context").

[33] See *ibid.* (referring to "the many later cases in which the Supreme Court has directed the suspension of judicial proceedings pending the referral of similar issues to the ICC" in view of the *Keogh* concern about the need for the ICC to determine the propriety of a lower rate).

of subsequent developments, this Court might be prepared to overrule *Keogh*. We conclude, however, that the developments in the six decades since *Keogh* was decided are insufficient to overcome the strong presumption of continued validity that adheres in the judicial interpretation of a statute.[34] As Justice Brandeis himself observed, a decade after his *Keogh* decision, in commenting on the presumption of stability in statutory interpretation: "*Stare decisis* is usually the wise policy because in most matters, it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true, even where the error is a matter of serious concern, provided correction can be had by legislation."[35] We are especially reluctant to reject this presumption in an area that has seen careful, intense, and sustained congressional attention. If there is to be an overruling of the *Keogh* rule, it must come from Congress, rather than from this Court.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE MARSHALL, dissenting.

In his opinion for the Court of Appeals, Judge Friendly cogently and comprehensively explained why the reasoning of *Keogh* v. *Chicago & Northwestern R. Co.*, 260 U. S. 156 (1922), has been rendered obsolete by subsequent developments in the law. He demonstrated that *Keogh* should be overruled, and I am persuaded by his analysis. I therefore dissent.

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[34] See, *e. g.*, *NLRB* v. *Longshoremen*, 473 U. S. 61, 84 (1985) ("[W]e should follow the normal presumption of *stare decisis* in cases of statutory interpretation"); *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720, 736 (1977) ("[W]e must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation"). See also Levi, An Introduction to Legal Reasoning, 15 U. Chi. L. Rev. 501, 540 (1948) ("The doctrine of finality for prior decisions setting the course for the interpretation of a statute is not always followed. . . . Nevertheless, the doctrine remains as more than descriptive. More than any other doctrine in the field of precedent, it has served to limit the freedom of the court. It marks an essential difference between statutory interpretation on the one hand and case law and constitutional interpretation on the other").

[35] *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932) (dissenting).

FEDERAL DEPOSIT INSURANCE CORPORATION *v.* PHILADELPHIA GEAR CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 84-1972. Argued March 4, 1986—Decided May 27, 1986

On the application of a customer of respondent, a bank issued a standby letter of credit for respondent's benefit in the amount of $145,200. The letter of credit provided that a draft drawn upon it would be honored by the bank only if accompanied by respondent's signed statement that the customer had failed to make payment for invoiced goods. On the same day that the letter of credit was issued, the customer executed an unsecured promissory note in the bank's favor. The customer and the bank understood the liability on the note to be contingent on respondent's presenting drafts on the letter of credit after the customer's nonpayment. Subsequently, the bank was declared insolvent, and petitioner Federal Deposit Insurance Corporation (FDIC) was appointed its receiver. Respondent then presented to the FDIC drafts on the letter of credit for payment of over $700,000 worth of goods delivered to the customer before the bank became insolvent. When the drafts were returned unpaid, respondent sued the FDIC in Federal District Court, alleging that the letter of credit backed by a promissory note was an insured deposit under the definition of "deposit" in 12 U. S. C. § 1813(*l*)(1) as an unpaid balance of "money or its equivalent" received or held by a bank that, *inter alia*, is evidenced by a letter of credit, and that therefore respondent was entitled to $100,000 in deposit insurance, this being the maximum amount insured by the FDIC. The District Court agreed, and the Court of Appeals affirmed.

Held: A standby letter of credit backed by a contingent promissory note does not give rise to an insured deposit. This has been the FDIC's longstanding interpretation, and such interpretation is consistent with Congress' purpose in creating federal deposit insurance to protect the assets and "hard earnings" that businesses and individuals have entrusted to banks. This purpose would not be furthered by extending deposit insurance to cover a standby letter of credit backed by a contingent promissory note, which involves no such surrender of assets or hard earnings to the bank's custody. In this case, the bank was not in possession of any of respondent's or the customer's assets when it went into receivership. Pp. 430–440.

751 F. 2d 1131, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, POWELL, and STEVENS, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BLACKMUN and REHNQUIST, JJ., joined, *post*, p. 440.

Charles A. Rothfeld argued the cause for petitioner. With him on the briefs were *Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Wallace,* and *John C. Murphy, Jr.*

Gerald F. Slattery, Jr., argued the cause and filed a brief for respondent.*

JUSTICE O'CONNOR delivered the opinion of the Court.

We granted certiorari to consider whether a standby letter of credit backed by a contingent promissory note is insured as a "deposit" under the federal deposit insurance program. We hold that, in light of the longstanding interpretation of petitioner Federal Deposit Insurance Corporation (FDIC) that such a letter does not create a deposit and, in light of the fact that such a letter does not entrust any noncontingent assets to the bank, a standby letter of credit backed by a contingent promissory note does not give rise to an insured deposit.

I

Orion Manufacturing Corporation (Orion) was, at the time of the relevant transactions, a customer of respondent Phila-

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*Briefs of *amici curiae* urging reversal were filed for the American Bankers Association et al. by *John L. Warden* and *Stanley F. Farrar;* for the Council on International Banking, Inc., by *Bud G. Holman;* for the National Association of Bond Lawyers by *Daniel O. Mahoney;* and for the U. S. Conference of Mayors et al. by *Benna Ruth Solomon* and *Joyce Holmes Benjamin.*

George W. Miller and *Dennis J. Lehr* filed a brief for William H. Allen et al. as *amici curiae* urging affirmance.

delphia Gear Corporation (Philadelphia Gear). On Orion's application, the Penn Square Bank, N. A. (Penn Square) issued a letter of credit for the benefit of Philadelphia Gear in the amount of $145,200. The letter of credit provided that a draft drawn upon the letter of credit would be honored by Penn Square only if accompanied by Philadelphia Gear's "signed statement that [it had] invoiced Orion Manufacturing Corporation and that said invoices have remained unpaid for at least fifteen (15) days." App. 25. Because the letter of credit was intended to provide payment to the seller only if the buyer of the invoiced goods failed to make payment, the letter of credit was what is commonly referred to as a "standby" or "guaranty" letter of credit. See, *e. g.*, 12 CFR § 337.2(a), and n. 1 (1985) (defining standby letters of credit and mentioning that they may "'guaranty' payment of a money obligation"). A conventional "commercial" letter of credit, in contrast, is one in which the seller obtains payment from the issuing bank without looking to the buyer for payment even in the first instance. See *ibid.* (distinguishing standby letters of credit from commercial letters of credit). See also Verkuil, Bank Solvency and Guaranty Letters of Credit, 25 Stan. L. Rev. 716, 717–724 (1973); Arnold & Bransilver, The Standby Letter of Credit—The Controversy Continues, 10 U.C.C.L.J. 272, 277–279 (Spring 1978).

On the same day that Penn Square issued the standby letter of credit, Orion executed an unsecured promissory note for $145,200 in favor of Penn Square. App. 27. The purpose of the note was listed as "Back up Letter of Credit." *Ibid.* Although the face of the note did not so indicate, both Orion and Penn Square understood that nothing would be considered due on the note, and no interest charged by Penn Square, unless Philadelphia Gear presented drafts on the standby letter of credit after nonpayment by Orion. 751 F. 2d 1131, 1134 (CA10 1984). See also Tr. of Oral Arg. 32.

On July 5, 1982, Penn Square was declared insolvent. Petitioner FDIC was appointed its receiver. Shortly thereafter, Philadelphia Gear presented drafts on the standby letter of credit for payment of over $700,000 for goods delivered before Penn Square's insolvency. The FDIC returned the drafts unpaid. 751 F. 2d., at 1133–1134.

Philadelphia Gear sued the FDIC in the Western District of Oklahoma. Philadelphia Gear alleged that the standby letter of credit was an insured deposit under the definition of "deposit" set forth at 12 U. S. C. § 1813(*l*)(1), and that Philadelphia Gear was therefore entitled to $100,000 in deposit insurance from the FDIC. See 12 U. S. C. § 1821(a)(1) (setting forth $100,000 as the maximum amount generally insured by the FDIC for any single depositor at a given bank). In apparent hopes of obtaining additional funds from the FDIC in the latter's capacity as receiver rather than as insurer, respondent also alleged that terms of the standby letter of credit allowing repeated reinstatements of the credit made the letter's total value more than $145,200.

The District Court held that the total value of the standby letter of credit was $145,200, App. B to Pet. for Cert. 20a, 28a-30a; that the letter was an insured deposit on which the FDIC was liable for $100,000 in deposit insurance, *id.*, at 37a-43a; and that Philadelphia Gear was entitled to prejudgment interest on that $100,000, *id.*, at 43a. The FDIC appealed from the District Court's ruling that the standby letter of credit backed by a contingent promissory note constituted a "deposit" for purposes of 12 U. S. C. § 1813(*l*)(1) and its ruling that Philadelphia Gear was entitled to an award of prejudgment interest. Philadelphia Gear cross-appealed from the District Court's ruling on the total value of the letter of credit.

The Court of Appeals for the Tenth Circuit reversed the District Court's award of prejudgment interest, 751 F. 2d, at 1138–1139, but otherwise affirmed the District Court's decision. As to the definition of "deposit," the Court of Appeals held that a standby letter of credit backed by a promissory note fell within the terms of 12 U. S. C. § 1813(*l*)(1)'s definition of "deposit," and was therefore insured. *Id.*, at 1134–1138. We granted the FDIC's petition for certiorari on this aspect of the Court of Appeals' ruling. 474 U. S. 918 (1985). We now reverse.

II

Title 12 U. S. C. § 1813(*l*)(1) provides:

> "The term 'deposit' means—
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> "(1) the unpaid balance of money or its equivalent received or held by a bank in the usual course of business and for which it has given or is obligated to give credit, either conditionally or unconditionally, to a commercial . . . account, or which is evidenced by . . . a letter of credit or a traveler's check on which the bank is primarily liable: *Provided*, That, without limiting the generality of the term 'money or its equivalent,' any such account or instrument must be regarded as evidencing the receipt of the equivalent of money when credited or issued in exchange for checks or drafts or for a promissory note upon which the person obtaining any such credit or instrument is primarily or secondarily liable . . . ."

Philadelphia Gear successfully argued before the Court of Appeals that the standby letter of credit backed by a contingent promissory note constituted a "deposit" under 12 U. S. C. § 1813(*l*)(1) because that letter was one on which the bank was primarily liable, and evidenced the receipt by the bank of "money or its equivalent" in the form of a promissory note upon which the person obtaining the credit was primarily or secondarily liable. The FDIC does not here dispute that the bank was primarily liable on the letter of credit. Brief for Petitioner 7, n. 7. Nor does the FDIC contest the fact that the backup note executed by Orion is, at least in some sense, a "promissory note." See Tr. of Oral Arg. 7 (remarks of Mr. Rothfeld, representing the FDIC) ("It was labeled a note. It can be termed a note"). The FDIC argues rather that it has consistently interpreted § 1813(*l*)(1) not to include standby letters of credit backed only by a contingent promissory note because such a note represents no hard assets and thus does not constitute "money or its equivalent." Because the alleged "deposit" consists only of a *contingent* liability, asserts the FDIC, a standby letter of credit backed by a contingent promissory note does not give rise to a "deposit" that Congress intended the FDIC to insure. Under this theory, while the note here may have been labeled a promissory note on its face and may have been a promissory note under state law, it was not a promissory note for purposes of the federal law set forth in 12 U. S. C. § 1813(*l*)(1). See *D'Oench, Duhme & Co.* v. *FDIC*, 315 U. S. 447, 456 (1942) (holding that liability on a promissory note acquired by the FDIC is a federal question); *First National Bank* v. *Dickinson*, 396 U. S. 122, 133–134 (1969) (holding that federal law governs the definition of branch banking under the McFadden Act).

The Court of Appeals quite properly looked first to the language of the statute. See *Florida Power & Light Co.* v. *Lorion*, 470 U. S. 729, 735 (1985); *United States* v. *Yermian*, 468 U. S. 63, 68 (1984). Finding the language of the proviso in § 1813(*l*)(1) sufficiently plain, the Court of Appeals looked no further. But as the FDIC points out, the terms "letter of credit" and "promissory note" as used in the statute have a federal definition, and the FDIC has developed and interpreted those definitions for many years within the framework of the complex statutory scheme that the FDIC administers. The FDIC's interpretation of whether a standby letter of credit backed by a contingent promissory note constitutes a "deposit" is consistent with Congress' desire to protect the hard earnings of individuals by providing for federal deposit insurance. Since the creation of the FDIC, Congress has expressed no dissatisfaction with the FDIC's interpretation of "deposit"; indeed, Congress in 1960 adopted the FDIC's regulatory definition as the statutory language. When we weigh all these factors together, we are constrained to conclude that the term "deposit" does not include a standby letter of credit backed by a contingent promissory note.

A

Justice Holmes stated that, as to discerning the constitutionality of a federal estate tax, "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349 (1921). Although the genesis of the Federal Deposit Insurance Act may not be quite so powerful a substitute for legal analysis, that history is worthy of at least a page of recounting for the light it sheds on Congress' purpose in passing the Act. Cf. *Watt* v. *Alaska*, 451 U. S. 259, 266 (1981) ("The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect").

When Congress created the FDIC, the Nation was in the throes of an extraordinary financial crisis. See generally F. Allen, Since Yesterday: The Nineteen-Thirties in America 98–121 (1940); A. Schlesinger, The Crisis of the Old Order 474–482 (1957). More than one-third of the banks in the United States open in 1929 had shut their doors just four years later. Bureau of the Census, Historical Statistics of the United States: Colonial Times to 1970, pt. 2, pp. 1019, 1038 (1976). In response to this financial crisis, President Roosevelt declared a national banking holiday effective the first business day after he took office. 48 Stat. 1689. Congress in turn responded with extensive legislation on banking, including the laws that gave the FDIC its existence.

Congress' purpose in creating the FDIC was clear. Faced with virtual panic, Congress attempted to safeguard the hard earnings of individuals against the possibility that bank failures would deprive them of their savings. Congress passed the 1933 provisions "[i]n order to provide against a repetition of the present painful experience in which a vast sum of *assets and purchasing power* is 'tied up.'" S. Rep. No. 77, 73d Cong., 1st Sess., 12 (1933) (emphasis added). The focus of Congress was therefore upon ensuring that a deposit of "hard earnings" entrusted by individuals to a bank would not lead to a tangible loss in the event of a bank failure. As the chairman of the relevant Committee in the House of Representatives explained on the floor:

> "[T]he purpose of this legislation is to protect the people of the United States in the right to have banks in which their deposits will be safe. They have a right to expect of Congress the establishment and maintenance of a system of banks in the United States where citizens may place their hard earnings with reasonable expectation of being able to get them out again upon demand. . . .
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> . . . . .
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> "[The purpose of the bill is to ensure that] the community is saved from the shock of a bank failure, and every citizen has been given an opportunity to withdraw his deposits. . . .
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> . . . . .
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> "The public . . . demand of you and me that we provide a banking system worthy of this great Nation and banks in which citizens may place the fruits of their toil and know that a deposit slip in return for their hard earnings will be as safe as a Government bond." 77 Cong. Rec. 3837, 3838, 3840 (1933) (remarks of Rep. Steagall).

See also *id.*, at 3913 (remarks of Rep. Keller) ("[We must make] it absolutely certain that . . . any and every man, woman, or child who puts a dollar in any bank can absolutely know that he will under no circumstances lose a single penny of it"); *id.*, at 3924 (remarks of Rep. Green) ("It is time that we pass a law so secure that when a man puts his money in a bank he will know for sure that when he comes back it will be there"). To prevent bank failure that resulted in the tangible loss of hard assets was therefore the focus of Congress' effort in creating deposit insurance.

Despite the fact Congress revisited the deposit insurance statute in 1935, 1950, and 1960, these comments remain the best indication of Congress' underlying purpose in creating deposit insurance. The Reports on the 1935 amendments presented the definition of "deposit" without any specific comment. See H. R. Rep. No. 742, 74th Cong., 1st Sess., 2 (1935); S. Rep. No. 1007, 74th Cong., 1st Sess., 2–4 (1935); H. R. Conf. Rep. No. 1822, 74th Cong., 1st Sess., 44 (1935). The floor debates centered around changes in the Federal Reserve System made in the same bill, not on deposit insurance. See, *e. g.*, 79 Cong. Rec. 6568–6577, 6651–6660 (1935). Indeed, in light of the fact that instruments denominated "promissory notes" seem at the time to have been considered exclusively uncontingent, see, *e. g.*, 16 Fed. Res. Bull. 520 (1930) (Regulation A) (defining promissory note as an "*unconditional* promise . . . to pay [a sum certain in dollars] at a fixed or determinable future time") (emphasis added); *Gilman* v. *Commissioner*, 53 F. 2d 47, 50 (CA8 1931) ("The form of these [contingent] instruments referred to as 'promissory notes' is very unusual"), it is unlikely that Congress would have had occasion to refer expressly to contingent notes such as the one before us here even if Congress had turned its attention to the definition of "deposit" when it first enacted the provision treating "money or its equivalent."

The legislative history of the 1950 amendments is similarly unhelpful, as one would expect given that the relevant provisions were reenacted but unchanged. See S. Rep. No. 1269, 81st Cong., 2d Sess., 2–3 (1950); H. R. Rep. No. 2564, 81st Cong., 2d Sess., 5–6 (1950). The Committee Reports on the 1960 amendments likewise give no indication that the amendments' phrasing was meant to effect any fundamental changes in the definition of deposit; those Reports state only that the changes are intended to bring into harmony the definitions of "deposit" used for purposes of deposit insurance with those used in reports of condition, and that the FDIC's rules and regulations are to be incorporated into the new definition. See H. R. Rep. No. 1827, 86th Cong., 2d Sess., 3, 5 (1960); S. Rep. No. 1821, 86th Cong., 2d Sess., 7, 10 (1960).

See also 106 Cong. Rec. 14794 (1960) (discussing pre-1960 scheme).

Congress' focus in providing for a system of deposit insurance—a system that has been continued to the present without modification to the basic definition of deposits that are "money or its equivalent"—was clearly a focus upon safeguarding the assets and "hard earnings" that businesses and individuals have entrusted to banks. Congress wanted to ensure that someone who put tangible assets into a bank could always get those assets back. The purpose behind the insurance of deposits in general, and especially in the section defining deposits as "money or its equivalent," therefore, is the protection of assets and hard earnings entrusted to a bank.

This purpose is not furthered by extending deposit insurance to cover a standby letter of credit backed by a contingent promissory note, which involves no such surrender of assets or hard earnings to the custody of the bank. Philadelphia Gear, which now seeks to collect deposit insurance, surrendered absolutely nothing to the bank. The letter of credit is for Philadelphia Gear's benefit, but the bank relied upon Orion to meet the obligations of the letter of credit and made no demands upon Philadelphia Gear. Nor, more importantly, did Orion surrender any assets unconditionally to the bank. The bank did not credit any account of Orion's in exchange for the promissory note, and did not treat its own assets as increased by its acceptance of the note. The bank could not have collected on the note from Orion unless Philadelphia Gear presented the unpaid invoices and a draft on the letter of credit. In the absence of a presentation by Philadelphia Gear of the unpaid invoices, the promissory note was a wholly contingent promise, and when Penn Square went into receivership, neither Orion nor Philadelphia Gear had lost anything except the ability to use Penn Square to reduce Philadelphia Gear's risk that Philadelphia Gear would go unpaid for a delivery of goods to Orion.

B

Congress' actions with respect to the particular definition of "deposit" that it has chosen in order to effect its general purpose likewise lead us to believe that a standby letter of credit backed by a contingent promissory note is not an insurable "deposit." In 1933, Congress amended the Federal Reserve Act to authorize the creation of the FDIC and charged it "to insure . . . the deposits of all banks which are entitled to the benefits of [FDIC] insurance." § 8, Banking Act of 1933, ch. 89, 48 Stat. 168. Congress did not define the term "deposit," however, until the Banking Act of 1935, in which it stated:

> "The term 'deposit' means the unpaid balance of money or its equivalent received by a bank in the usual course of business and for which it has given or is obligated to give credit to a commercial, checking, savings, time or thrift account, or which is evidenced by its certificate of deposit, and trust funds held by such bank whether retained or deposited in any department of such bank or deposited in another bank, together with such other obligations of a bank as the board of directors [of the FDIC] shall find and shall prescribe by its regulations to be deposit liabilities by general usage . . . ." § 101, Banking Act of 1935, ch. 614, 49 Stat. 684, 685–686.

Less than two months after this statute was enacted, the FDIC promulgated a definition of "deposit," which provided in part that "letters of credit must be regarded as issued for the equivalent of money when issued in exchange for . . . promissory notes upon which the person procuring [such] instruments is primarily or secondarily liable." See 12 CFR § 301.1(d) (1939) (codifying Regulation I, rule 1, Oct. 1, 1935), revoked after incorporation into statutory law, 12 CFR 234 (Supp. 1962).

In 1950, Congress revisited the provisions specifically governing the FDIC in order to remove them from the Federal

Reserve Act and place them into a separate Act. See Act of Sept. 21, 1950, ch. 967, 64 Stat. 874. The new provisions did not modify the definition of "deposit." In 1960, Congress expanded the statutory definition of "deposit" in several categories, and also incorporated the regulatory definition that the FDIC had employed since 1935 into the statute that remains in force today. See *supra*, at 430 (quoting current version of statute).

At no point did Congress disown its initial, clear desire to protect the hard assets of depositors. See *supra*, at 432–435. At no point did Congress criticize the FDIC's longstanding interpretation, see *infra*, at 438, that a standby letter of credit backed by a contingent promissory note is not a "deposit." In fact, Congress had reenacted the 1935 provisions in 1950 without changing the definition of "deposit" at all. Compare 49 Stat. 685–686 with 64 Stat. 874–875. When the statute giving rise to the longstanding interpretation has been reenacted without pertinent change, the "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *NLRB* v. *Bell Aerospace*, 416 U. S. 267, 275 (1974). See *Zenith Radio Corp.* v. *United States*, 437 U. S. 443, 457 (1978). Indeed, the current statutory definition of "deposit," added by Congress in 1960, was expressly designed to incorporate the FDIC's rules and regulations on "deposits." As Committees of both Houses of Congress explained the amendments: "The amended definition would include the present statutory definition of deposits, *and the definition of deposits in the rules and regulations of the Federal Deposit Insurance Corporation*, [along] with . . . changes [in sections other than what is now § 1813(*l*)(1)]." H. R. Rep. No. 1827, 86th Cong., 2d Sess., 5 (1960) (emphasis added); S. Rep. No. 1821, 86th Cong., 2d Sess., 10 (1960) (same). Congress, therefore, has expressly incorporated into the statutory scheme the regulations that the FDIC devised to assist it in determining what constitutes a "deposit" within the statutory scheme. Under these circumstances, we must obviously give a great deal of deference to the FDIC's interpretation of what these regulations do and do not include within their definition of "deposit."

C

Although the FDIC does not argue that it has an express regulation excluding a standby letter of credit backed by a contingent promissory note from the definition of "deposit" in 12 U. S. C. § 1813(*l*)(1), that exclusion by the FDIC is nonetheless longstanding and consistent. At a meeting of FDIC and bank officials shortly after the FDIC's creation, a bank official asked whether a letter of credit issued by a charge against a customer's account was a deposit. The FDIC official replied:

> "'If your letter of credit is issued by a charge against a depositor's account or for cash and the letter of credit is reflected on your books as a liability, you do have a deposit liability. If, on the other hand, you merely extend a line of credit to your customer, you will only show a contingent liability on your books. In that event no deposit liability has been created.'" Transcript as quoted in *FDIC* v. *Irving Trust Co.*, 137 F. Supp. 145, 161 (SDNY 1955).

Because Penn Square apparently never reflected the letter of credit here as a noncontingent liability, and because the interwoven financial instruments at issue here can be viewed most accurately as the extension of a line of credit by Penn Square to Orion, this transcript lends support to the FDIC's contention that its longstanding policy has been to exclude standby letters of credit backed by contingent promissory notes from 12 U. S. C. § 1813(*l*)(1)'s definition of "deposit."

The FDIC's contemporaneous understanding that standby letters of credit backed by contingent promissory notes do not generate a "deposit" for purposes of 12 U. S. C. § 1813(*l*)(1) has been fortified by its behavior over the following decades. The FDIC has asserted repeatedly that it has never charged deposit insurance premiums on standby letters of credit backed by contingent promissory notes, and Philadelphia Gear does not contest that assertion. See Tr. of Oral Arg. 42. Congress requires the FDIC to assess contributions to its insurance fund at a fixed percentage of a bank's "deposits" under 12 U. S. C. § 1813(*l*)(1). See 12 U. S. C. §§ 1817(a)(4), (b)(1), (b)(4)(A). By the time that this suit—the first challenge to the FDIC's treatment of standby letters of credit backed by contingent promissory notes—was brought, almost $100 billion in standby letters of credit was outstanding. See Board of Governors of the Federal Reserve System, Annual Statistical Digest 71 (1983); FDIC, 1983 Statistics on Banking (Table 110F). The FDIC's failure to levy premiums on standby letters of credit backed by contingent promissory notes therefore clearly demonstrates that the FDIC has never considered such letters to reflect deposits.

Although the FDIC's interpretation of the relevant statute has not been reduced to a specific regulation, we conclude nevertheless that the FDIC's practice and belief that a standby letter of credit backed by a contingent promissory note does not create a "deposit" within the meaning of 12 U. S. C. § 1813(*l*)(1) are entitled in the circumstances of this case to the "considerable weight [that] should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844 (1984). As we have stated above, the FDIC's interpretation here of a statutory definition adopted wholesale from the FDIC's own regulation is consistent with congressional purpose, and may certainly stand.

III

Philadelphia Gear essentially seeks to have the FDIC guarantee the contingent credit extended to Orion, not assets entrusted to the bank by Philadelphia Gear or by Orion on Philadelphia Gear's behalf. With a standard "commercial" letter of credit, Orion would typically have unconditionally entrusted Penn Square with funds before Penn Square would have written the letter of credit, and thus Orion would have lost something if Penn Square became unable to honor its obligations. As the FDIC concedes, deposit insurance extends to such a letter of credit backed by an uncontingent promissory note. See Tr. of Oral Arg. 8 (statement of Mr. Rothfeld, representing the FDIC) ("If this note were a fully uncontingent negotiable note that were not limited by any side agreements, it would be a note backing a letter of credit within the meaning of the statute"). See also *id.*, at 17–18. But here, with a standby letter of credit backed by a contingent promissory note, Penn Square was not in possession of any of Orion's or Philadelphia Gear's assets when it went into receivership. Nothing was ventured, and therefore no insurable deposit was lost. We believe that, whatever the relevant State's definition of "letter of credit" or "promissory note," Congress did not by using those phrases in 12 U. S. C. § 1813(*l*)(1) intend to protect with deposit insurance a standby letter of credit backed only by a contingent promissory note. We thus hold that such an arrangement does not give rise to a "deposit" under 12 U. S. C. § 1813(*l*)(1).

Accordingly, the judgment of the court below is reversed, and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

JUSTICE MARSHALL, with whom JUSTICE BLACKMUN and JUSTICE REHNQUIST join, dissenting.

There is considerable common sense backing the Court's opinion. The standby letter of credit in this case differs considerably from the savings and checking accounts that come most readily to mind when one speaks of an insured deposit. Nevertheless, to reach this common-sense result, the Court must read qualifications into the statute that do not appear there. We recently recognized that even when the ingenuity of businessmen creates transactions and corporate forms that were perhaps not contemplated by Congress, the courts must enforce the statutes that Congress has enacted. See *Board of Governors, FRS* v. *Dimension Financial Corp.*, 474 U. S. 361, 373–375 (1986). Congress unmistakably provided that letters of credit backed by promissory notes constitute "deposits" for purposes of the federal deposit insurance program, and the Court's attempt to draw distinctions between different types of letter of credit transactions forces it to ignore both the statute and some settled principles of commercial law. Here, as in *Dimension*, the inflexibility of the statute as applied to modern financial transactions is a matter for Congress, not the FDIC or this Court, to remedy.

It cannot be doubted that the standby letter of credit in this case meets the literal definition of a "deposit" contained in 12 U. S. C. § 1813(*l*)(1). It is "a letter of credit . . . on which the bank is primarily liable . . . issued in exchange for . . . a promissory note upon which [Orion] is primarily or secondarily liable." The Court, however, holds that the note in this case, whether or not it is a promissory note under the Uniform Commercial Code (UCC) and Oklahoma law, is not a promissory note for purposes of the Federal Deposit Insurance Act. We should assume, absent convincing evidence to the contrary, that Congress intended for the term "promissory note" to derive its meaning from the ordinary sources of commercial law. I believe that there is no such evidence in this case.

The Court justifies its restrictive reading of the term "promissory note" in large part by arguing that Congress would not have wanted to include in that term any obligation that was not the present equivalent of money. The keystone of the FDIC's arguments, and of the Court's decision, is that Orion did not entrust "money or its equivalent" to the bank. The note in this case, however, was the equivalent of money, and the Court's reading of Congress' intent is therefore largely irrelevant.

FDIC concedes, as it must, that Congress has determined that a promissory note generally constitutes money or its equivalent. Moreover, that statutory definition comports with economic reality. Promissory notes typically are negotiable instruments and therefore readily convertible into cash. The FDIC argues, and the Court holds, that the promissory note in this case is "contingent" and therefore not the equivalent of money. However, while the FDIC argues strenuously that Orion's note is not a promissory note in the usual sense of the word, one could more plausibly state that it is not a "contingent" obligation in the usual sense of that word. On its face the note is an unconditional obligation of Orion to pay the holder $145,200 plus accrued interest on August 1, 1982. It sets out no conditions that would affect the negotiability of the note, and therefore is fully negotiable for purposes of the UCC, U.C.C. § 3-104(1) (1977); Okla. Stat., Tit. 12A, § 3-104(1) (1981).

The Court therefore misses the point when it states that at the time of the original banking Acts, the term "promissory note" was not understood to include a contingent obligation. *Ante*, at 434. The note at issue in this case is an unconditional promise to pay, and satisfies all the requisites of a negotiable promissory note, either under the UCC or the common law as it existed in the 1930's. The only contingencies attached to Orion's obligation arise out of a separate contract. As to such contingencies, the law was well settled long before 1930:

> "[I]n order to make a note invalid as a promissory note, the contingency to avoid it must be apparent, either upon the face of the note, or upon some contemporaneous written memorandum on the same paper; for, if the memorandum is not contemporaneous, or if it be merely verbal in each case, whatever may be its effect as a matter of defence between the original parties, it is not deemed to be a part of the instrument, and does not af-

> fect, much less invalidate, its original character." J. Thorndike, Story on Promissory Notes 34 (7th ed. 1878) (footnotes omitted).[1]

It is far from a matter of semantics to state that while Orion and the bank may have an oral understanding concerning the bank's treatment of Orion's note, that note itself is unconditional and equivalent to money. The Court correctly observes that the bank would have breached its oral contract had it attempted to sue on the note; nevertheless, Orion would have had separately to plead and prove a breach of contract in that case, because parol evidence that the contract between the parties differed from the written instrument would have been inadmissible in the bank's action to collect the debt. See *American Perforating Co.* v. *Oklahoma State Bank*, 463 P. 2d 958, 962–963 (Okla. 1970). Similarly, should the note have found its way into the hands of a third party, Orion would have had no choice but to honor it, again being left with only the right to sue the bank for breach of the oral contract. Orion's entrustment of the note to the bank was not, therefore, completely risk free.

The risk taken on by Orion may not differ substantially from the risk assumed by one who hands over money to the bank to guarantee repayment of funds paid out on a letter of credit. The bank typically undertakes to put such cash collateral into a special account, where it never enters into the general assets of the bank. See U.C.C. § 5–117, comment (1977). Should the bank cease operations, the customer will enjoy a preference in bankruptcy, entitling it to receive its money back before general unsecured creditors of the bank are paid. U.C.C. § 5–117; Okla. Stat., Tit. 12A, § 5–117 (1981). Like Orion, then, that hypothetical customer has little to fear absent misconduct by the bank or a third party. If the federal deposit insurance program should not protect Philadelphia Gear, therefore, it probably should not protect *any* holder of a letter of credit, whether commercial, standby, funded, or unfunded.[2] That, however, is clearly a matter for Congress to determine.

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[1] We would have a very different case if the conditions put upon Orion's obligation to the bank were reflected on the face of the note, as they were in *Allen* v. *FDIC*, 599 F. Supp. 104 (ED Tenn. 1984), appeal pending, No. 85–5003 (CA6), a case raising the same issue as the present one. Because such a note is not negotiable, it is much more plausible to argue that Congress would not have considered it "money or its equivalent." The note in this case, however, is in no sense a contingent note.

While the Court purports to examine what Congress meant when it said "promissory note," in fact the Court's opinion does not rest on any special attributes of Orion's note. Rather, the Court rules that when an individual entrusts a negotiable instrument to a bank, that instrument is not "money or its equivalent" for purposes of § 1813(*l*)(1) so long as the bank promises not to negotiate it or collect on it until certain conditions are met. That is a proviso that Congress might have been well advised to include in the Act, but did not. I therefore dissent.

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[2] It seems odd that Philadelphia Gear's status as an insured depositor should depend on the terms of the repayment agreement between Orion and the bank. Ordinarily, Philadelphia Gear would be indifferent to the agreement between Orion and the bank, and might not even be aware of the terms of that agreement. The Court, therefore, is not necessarily bringing greater rationality to this area of the law by creating distinctions between types of letters of credit for purposes of federal deposit insurance coverage.

PUBLIC SERVICE COMMISSION OF MARYLAND *v.* CHESAPEAKE & POTOMAC TELEPHONE COMPANY OF MARYLAND

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84–1362. Argued January 13, 1986—Decided May 27, 1986

748 F. 2d 879, vacated and remanded.

Kirk J. Emge argued the cause and filed briefs for petitioner.

Jack D. Smith argued the cause for the Federal Communications Commission as *amicus curiae* urging reversal. With him on the brief were *Acting Solicitor General Fried, Deputy Solicitor General Wallace, Christopher J. Wright, Daniel M. Armstrong,* and *Jane E. Mago.*

D. Michael Stroud argued the cause for respondent. With him on the brief were *J. William Sarver, Mark J. Mathis,* and *Daniel I. Prywes.**

PER CURIAM.

We vacate the judgment of the Court of Appeals for the Fourth Circuit and remand for further proceedings consistent with the opinion in *Louisiana Public Service Comm'n* v. *FCC*, *ante*, p. 355.

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*A brief of *amici curiae* urging reversal was filed for the State of California et al. by *Janice E. Kerr, J. Calvin Simpson, Mark E. Fogelman, Ellen S. LeVine, Joseph I. Lieberman,* Attorney General of Connecticut, *William B. Gundling, Peter J. Jenkelunas,* and *Phyllis E. Lemell,* Assistant Attorneys General, *Howard C. Davenport, Wiliam S. Bilenky, Philip Stoffregen, Patrick Nugent, William Paul Rodgers, Jr., Jack Shreve, Stephen L. Skipper, Robert Waldrum, Joseph G. Donahue, William E. Furber, John K. Keane, Jr., Frank J. Kelley,* Attorney General of Michigan, *Louis J. Caruso,* Solicitor General, *Don L. Keskey* and *Leo H. Friedman,* Assistant Attorneys General, *Lynda S. Mounts, Brian Moline, Ellyn Elise Crutcher, Michael R. Fontham,* and *Marshall B. Brinkley.*

A brief of *amici curiae* urging affirmance was filed for American Telephone and Telegraph Co. et al. by *Michael Boudin, Thomas J. Reiman, Vincent L. Sgrosso, W. Preston Granbery,* and *John B. Messenger.*

It is so ordered.

JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this case.

FEDERAL TRADE COMMISSION *v.* INDIANA FEDERATION OF DENTISTS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 84-1809. Argued March 25, 1986—Decided June 2, 1986

Respondent organization of dentists in Indiana promulgated a policy requiring its members to withhold x rays from dental insurers in connection with evaluating patients' claims for benefits. The Federal Trade Commission (FTC) issued a cease-and-desist order, ruling that the policy constituted an unfair method of competition in violation of § 5 of the Federal Trade Commission Act, since it amounted to a conspiratorial restraint of trade in violation of § 1 of the Sherman Act. The Court of Appeals vacated the FTC's order on the ground that it was not supported by substantial evidence, holding that the FTC's findings that respondent's x-ray policy was anticompetitive were erroneous; that the findings were inadequate because of the FTC's failure to define the market in which respondent allegedly restrained competition and to establish that respondent had the power to restrain competition in that market; and that the FTC erred in not determining whether the alleged restraint on competition among dentists had actually resulted in higher dental costs to patients and insurers.

Held:

1. The FTC's factual findings regarding respondent's x-ray policy are supported by substantial evidence. There is no dispute that respondent's members conspired among themselves to withhold x rays, and the FTC's finding that competition among dentists with respect to cooperation with insurers' requests for x rays was diminished where respondent held sway also finds adequate support in the record. Pp. 455-457.

2. Evaluated under the Rule of Reason, the FTC's factual findings are sufficient as a matter of law to establish a violation of § 1 of the Sherman Act, *i.e.*, an unreasonable restraint of trade, and hence a violation of § 5 of the FTC Act. Respondent's x-ray policy takes the form of a horizontal agreement among its members to withhold from their customers a particular service that they desire. Absent some countervailing procompetitive virtue, such an agreement cannot be sustained under the Rule of Reason. This conclusion is not precluded by the absence of specific findings as to the market in which respondent allegedly restrained competition or as to the power of respondent's members in that market or by the FTC's failure to find that respondent's x-ray policy resulted in

more costly dental services than the patients and insurers would have chosen if they were able to evaluate x rays in conjunction with claim forms. Nor do alleged noncompetitive "quality of care" considerations justify respondent's x-ray policy. And whether or not respondent's policy is consistent with Indiana's supposed policy against submission of x rays to insurers, it is not immunized from antitrust scrutiny. Anticompetitive collusion among private actors, even when consistent with state policy, acquires antitrust immunity only when it is actually supervised by the State, and there is no suggestion of such supervision here. Pp. 457–465.

745 F. 2d 1124, reversed.

WHITE, J., delivered the opinion for a unanimous Court.

Marcy J. K. Tiffany argued the cause for petitioner. With her on the briefs were *Solicitor General Fried, Assistant Attorney General Ginsburg, Ernest J. Isenstadt, David C. Shonka*, and *L. Barry Costilo*.

Bruce W. Graham argued the cause for respondent. With him on the brief was *Ronald K. Fowler*.*

JUSTICE WHITE delivered the opinion of the Court.

This case concerns commercial relations among certain Indiana dentists, their patients, and the patients' dental health care insurers. The question presented is whether the Federal Trade Commission correctly concluded that a conspiracy among dentists to refuse to submit x rays to dental insurers for use in benefits determinations constituted an

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*Briefs of *amici curiae* urging reversal were filed for the American Association of Retired Persons by *Alfred Miller* and *Steven S. Honigman;* for the Health Insurance Association of America by *Joe Sims* and *Edwin R. Soeffing;* and for the Washington Business Group on Health by *Stephan E. Lawton.*

Briefs of *amici curiae* urging affirmance were filed for the American College of Radiology by *Reuben L. Hedlund* and *James A. Cherney;* for the American Dental Association by *Peter M. Sfikas;* for the American Medical Association by *Benjamin W. Heineman, Jr., Carter G. Phillips, Newton N. Minow*, and *Jack R. Bierig;* and for the Physicians and Surgeons Association of Massachusetts, Inc., by *Robert D. Paul* and *Donald B. Gould.*

"unfair method of competition" in violation of §5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. §45 (1982 ed. and Supp. II).

I

Since the 1970's, dental health insurers, responding to the demands of their policyholders, have attempted to contain the cost of dental treatment by, among other devices, limiting payment of benefits to the cost of the "least expensive yet adequate treatment" suitable to the needs of individual patients. Implementation of such cost-containment measures, known as "alternative benefits" plans, requires evaluation by the insurer of the diagnosis and recommendation of the treating dentist, either in advance of or following the provision of care. In order to carry out such evaluation, insurers frequently request dentists to submit, along with insurance claim forms requesting payment of benefits, any dental x rays that have been used by the dentist in examining the patient as well as other information concerning their diagnoses and treatment recommendations. Typically, claim forms and accompanying x rays are reviewed by lay claims examiners, who either approve payment of claims or, if the materials submitted raise a question whether the recommended course of treatment is in fact necessary, refer claims to dental consultants, who are licensed dentists, for further review. On the basis of the materials available, supplemented where appropriate by further diagnostic aids, the dental consultant may recommend that the insurer approve a claim, deny it, or pay only for a less expensive course of treatment.

Such review of diagnostic and treatment decisions has been viewed by some dentists as a threat to their professional independence and economic well-being. In the early 1970's, the Indiana Dental Association, a professional organization comprising some 85% of practicing dentists in the State of Indiana, initiated an aggressive effort to hinder insurers' efforts to implement alternative benefits plans by enlisting member dentists to pledge not to submit x rays in conjunction with claim forms.[1] The Association's efforts met considerable success: large numbers of dentists signed the pledge, and insurers operating in Indiana found it difficult to obtain compliance with their requests for x rays and accordingly had to choose either to employ more expensive means of making alternative benefits determinations (for example, visiting the office of the treating dentist or conducting an independent oral examination) or to abandon such efforts altogether.

By the mid-1970's, fears of possible antitrust liability had dampened the Association's enthusiasm for opposing the submission of x rays to insurers. In 1979, the Association and a number of its constituent societies consented to a Federal Trade Commission order requiring them to cease and desist from further efforts to prevent member dentists from submitting x rays. *In re Indiana Dental Assn.*, 93 F. T. C. 392. Not all Indiana dentists were content to leave the matter of submitting x rays to the individual dentist. In 1976, a group of such dentists formed the Indiana Federation of Dentists, respondent in this case, in order to continue to pursue the Association's policy of resisting insurers' requests for x rays. The Federation, which styled itself a "union" in the belief that this label would stave off antitrust liability,[2] immediately promulgated a "work rule" forbidding its members to submit x rays to dental insurers in conjunction with claim forms. Although the Federation's membership was small, numbering less than 100, its members were highly concentrated in and around three Indiana communities: Anderson, Lafayette, and Fort Wayne. The Federation succeeded in enlisting nearly 100% of the dental specialists in the Anderson area, and approximately 67% of the dentists in and around Lafayette. In the areas of its strength, the Federation was successful in continuing to enforce the Association's prior policy of refusal to submit x rays to dental insurers.

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[1] A presentation made in 1974 by Dr. David McClure, an Association official and later one of the founders of respondent Indiana Federation of Dentists, is revealing as to the motives underlying the dentists' resistance to the provision of x rays for use by insurers in making alternative benefits determinations:

"The problems associated with third party programs are many, but I believe the 'Indiana Plan' [*i. e.*, the policy of refusing to submit x rays] to be sound and if we work together, we can win this battle. We are fighting an economic war where the very survival of our profession is at stake.

"How long can some of the leaders of dentistry in other states be so complacent and willing to fall into the trap that is being set for us. If only they would take the time, to see from whence come the arrows that are heading in our direction. The Delta Dental Plans have bedded down with the unions and have been a party to setting up the greatest controls that any profession has ever known in a free society. . . .

"The name of the game is money. The government and labor are determined to reduce the cost of the dental health dollar at the expense of the dentist. There is no way a dental service can be rendered cheaper when the third party has to have its share of the dollar.

"Already we are locked into a fee freeze that could completely control the quality of dental care, if left on long enough." FTC Complaint Counsel's Trial Exhibit CX 372A, F, App. 104.

In 1978, the Federal Trade Commission issued a complaint against the Federation, alleging in substance that its efforts to prevent its members from complying with insurers' requests for x rays constituted an unfair method of competition in violation of § 5 of the Federal Trade Commission Act. Following lengthy proceedings including a full evidentiary hearing before an Administrative Law Judge, the Commission ruled that the Federation's policy constituted a violation of § 5 and issued an order requiring the Federation to cease and desist from further efforts to organize dentists to refuse to submit x rays to insurers. *In re Indiana Federation of Dentists*, 101 F. T. C. 57 (1983). The Commission based its ruling on the conclusion that the Federation's policy of requiring its members to withhold x rays amounted to a conspiracy in restraint of trade that was unreasonable and hence unlawful under the standards for judging such restraints developed in this Court's precedents interpreting § 1 of the Sherman Act. *E. g., Chicago Board of Trade* v. *United States*, 246 U. S. 231 (1918); *National Society of Professional Engineers* v. *United States*, 435 U. S. 679 (1978). The Commission found that the Federation had conspired both with the Indiana Dental Association and with its own members to withhold cooperation with dental insurers' requests for x rays; that absent such a restraint, competition among dentists for patients would have tended to lead dentists to compete with respect to their policies in dealing with patients' insurers; and that in those areas where the Federation's membership was strong, the Federation's policy had had the actual effect of eliminating such competition among dentists and preventing insurers from obtaining access to x rays in the desired manner. These findings of anticompetitive effect, the Commission concluded, were sufficient to establish that the restraint was unreasonable even absent proof that the Federation's policy had resulted in higher costs to the insurers and patients than would have occurred had the x rays been provided. Further, the Commission rejected the Federation's argument that its policy of withholding x rays was reasonable because the provision of x rays might lead the insurers to make inaccurate determinations of the proper level of care and thus injure the health of the insured patients: the Commission found no evidence that use of x rays by insurance companies in evaluating claims would result in inadequate dental care. Finally, the Commission rejected the Federation's contention that its actions were exempt from antitrust scrutiny because the withholding of x rays was consistent with the law and policy of the State of Indiana against the use of x rays in benefit determination by insurance companies. The Commission concluded that no such policy existed, and that in any event the existence of such a policy would not have justified the dentists' private and unsupervised conspiracy in restraint of trade.

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[2] Respondent no longer makes any pretense of arguing that it is immune from antitrust liability as a labor organization.

The Federation sought judicial review of the Commission's order in the United States Court of Appeals for the Seventh Circuit, which vacated the order on the ground that it was not supported by substantial evidence. 745 F. 2d 1124 (1984). Accepting the Federation's characterization of its rule against submission of x rays as merely an ethical and moral policy designed to enhance the welfare of dental patients, the majority concluded that the Commission's findings that the policy was anticompetitive were erroneous. According to the majority, the evidence did not support the finding that in the absence of restraint dentists would compete for patients by offering cooperation with the requests of the patients' insurers, nor, even accepting that finding, was there evidence that the Federation's efforts had prevented such competition. Further, the court held that the Commission's findings were inadequate because of its failure both to offer a precise definition of the market in which the Federation was alleged to have restrained competition and to establish that the Federation had the power to restrain competition in that market. Finally, the majority faulted the Commission for not finding that the alleged restraint on competition among dentists had actually resulted in higher dental costs to patients and insurers. The third member of the Court of Appeals panel concurred in the judgment solely on the ground that there was insufficient proof that cooperation with insurers was an element of dental services as to which dentists would tend to compete.

We granted certiorari, 474 U. S. 900 (1985), in order to consider the Commission's claim that in vacating the Commission's order the Court of Appeals misconstrued applicable principles of antitrust law and "'misapprehended or grossly misapplied' the substantial evidence test," *American Textile Manufacturers Institute, Inc.* v. *Donovan*, 452 U. S. 490, 523 (1981) (citation omitted). We now reverse.

II

The issue is whether the Commission erred in holding that the Federation's policy of refusal to submit x rays to dental insurers for use in benefits determinations constituted an "unfair method of competition," unlawful under § 5 of the Federal Trade Commission Act. The question involves review of both factual and legal determinations. As to the former, our review is governed by 15 U. S. C. § 45(c), which provides that "[t]he findings of the Commission as to the facts, if supported by evidence, shall be conclusive." The statute forbids a court to "make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences." *FTC* v. *Algoma Lumber Co.*, 291 U. S. 67, 73 (1934). Rather, as under the essentially identical "substantial evidence" standard for review of agency factfinding, the court must accept the Commission's findings of fact if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 477 (1951); see also *Beneficial Corp.* v. *FTC*, 542 F. 2d 611, 616 (CA3 1976), cert. denied, 430 U. S. 983 (1977).

The legal issues presented—that is, the identification of governing legal standards and their application to the facts found—are, by contrast, for the courts to resolve, although even in considering such issues the courts are to give some deference to the Commission's informed judgment that a particular commercial practice is to be condemned as "unfair." See *FTC* v. *Sperry & Hutchinson Co.*, 405 U. S. 233 (1972); *Atlantic Refining Co.* v. *FTC*, 381 U. S. 357, 367–368 (1965); *FTC* v. *Cement Institute*, 333 U. S. 683, 720 (1948). The standard of "unfairness" under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, see *FTC* v. *Cement Institute, supra*, at 689–695, but also practices that the Commission determines are against public policy for other reasons, see *FTC* v. *Sperry & Hutchinson Co.*, 405

U. S., at 244. Once the Commission has chosen a particular legal rationale for holding a practice to be unfair, however, familiar principles of administrative law dictate that its decision must stand or fall on that basis, and a reviewing court may not consider other reasons why the practice might be deemed unfair. See *id.*, at 245–250; cf. *SEC* v. *Chenery Corp.*, 318 U. S. 80 (1943). In the case now before us, the sole basis of the FTC's finding of an unfair method of competition was the Commission's conclusion that the Federation's collective decision to withhold x rays from insurers was an unreasonable and conspiratorial restraint of trade in violation of § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1. Accordingly, the legal question before us is whether the Commission's factual findings, if supported by evidence, make out a violation of Sherman Act § 1.

III

The relevant factual findings are that the members of the Federation conspired among themselves to withhold x rays requested by dental insurers for use in evaluating claims for benefits, and that this conspiracy had the effect of suppressing competition among dentists with respect to cooperation with the requests of the insurance companies. As to the first of these findings there can be no serious dispute: abundant evidence in the record reveals that one of the primary reasons—if not *the* primary reason—for the Federation's existence was the promulgation and enforcement of the so-called "work rule" against submission of x rays in conjunction with insurance claim forms.

As for the second crucial finding—that competition was actually suppressed—the Seventh Circuit held it to be unsupported by the evidence, on two theories. First, the court stated that the evidence did not establish that cooperation with requests for information by patients' insurance companies was an aspect of the provision of dental services with respect to which dentists would, in the absence of some restraint, compete. Second, the court found that even assuming that dentists would otherwise compete with respect to policies of cooperating or not cooperating with insurance companies, the Federation's policy did not impair that competition, for the member dentists continued to allow insurance companies to use other means of evaluating their diagnoses when reviewing claims for benefits: specifically, "the IFD member dentists allowed insurers to visit the dental office to review and examine the patient's x rays along with all of the other diagnostic and clinical aids used in formulating a proper course of dental treatment." 745 F. 2d, at 1143.

Neither of these criticisms of the Commission's findings is well founded. The Commission's finding that "[i]n the absence of . . . concerted behavior, individual dentists would have been subject to market forces of competition, creating incentives for them to . . . comply with the requests of patients' third-party insurers," 101 F. T. C., at 173, finds support not only in common sense and economic theory, upon both of which the FTC may reasonably rely, but also in record documents, including newsletters circulated among Indiana dentists, revealing that Indiana dentists themselves perceived that unrestrained competition tended to lead their colleagues to comply with insurers' requests for x rays. See App. to Pet. for Cert. 289a, 306a-308a. Moreover, there was evidence that outside of Indiana, in States where dentists had not collectively refused to submit x rays, insurance companies found little difficulty in obtaining compliance by dentists with their requests. 101 F. T. C., at 172. A "reasonable mind" could conclude on the basis of this evidence that competition for patients, who have obvious incentives for seeking dentists who will cooperate with their insurers, would tend to lead dentists in Indiana (and elsewhere) to cooperate with requests for information by their patients' insurers.

The Commission's finding that such competition was actually diminished where the Federation held sway also finds adequate support in the record. The Commission found that in the areas where Federation membership among dentists was most significant (that is, in the vicinity of Anderson and Lafayette) insurance companies were unable to obtain compliance with their requests for submission of x rays in conjunction with claim forms and were forced to resort to other, more costly, means of reviewing diagnoses for the purpose of benefit determination. Neither the opinion of the Court of Appeals nor the brief of respondent identifies any evidence suggesting that the Commission's finding that the Federation's policy had an actual impact on the ability of insurers to obtain the x rays they requested was incorrect. The lower court's conclusion that this evidence is to be discounted because Federation members continued to cooperate with insurers by allowing them to use more costly—indeed, prohibitively costly—methods of reviewing treatment decisions is unpersuasive. The fact remains that the dentists' customers (that is, the patients and their insurers) sought a particular service: cooperation with the insurers' pretreatment review through the forwarding of x rays in conjunction with claim forms. The Federation's collective activities resulted in the denial of the information the customers requested in the form that they requested it, and forced them to choose between acquiring that information in a more costly manner or forgoing it altogether. To this extent, at least, competition among dentists with respect to cooperation with the requests of insurers was restrained.

IV

The question remains whether these findings are legally sufficient to establish a violation of § 1 of the Sherman Act—that is, whether the Federation's collective refusal to cooperate with insurers' requests for x rays constitutes an "unreasonable" restraint of trade. Under our precedents, a restraint may be adjudged unreasonable either because it fits within a class of restraints that has been held to be *"per se"* unreasonable, or because it violates what has come to be known as the "Rule of Reason," under which the "test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Chicago Board of Trade* v. *United States*, 246 U. S., at 238.

The policy of the Federation with respect to its members' dealings with third-party insurers resembles practices that have been labeled "group boycotts": the policy constitutes a concerted refusal to deal on particular terms with patients covered by group dental insurance. Cf. *St. Paul Fire & Marine Insurance Co.* v. *Barry*, 438 U. S. 531 (1978); *Paramount Famous Lasky Corp.* v. *United States*, 282 U. S. 30 (1930). Although this Court has in the past stated that group boycotts are unlawful *per se*, see *United States* v. *General Motors Corp.*, 384 U. S. 127 (1966); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.* 359 U. S. 207 (1959), we decline to resolve this case by forcing the Federation's policy into the "boycott" pigeonhole and invoking the *per se* rule. As we observed last Term in *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U. S. 284 (1985), the category of restraints classed as group boycotts is not to be expanded indiscriminately, and the *per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor—a situation obviously not present here. Moreover, we have been slow to condemn rules adopted by professional associations as unreasonable *per se*, see *National Society of Professional Engineers* v. *United States*, 435 U. S. 679 (1978), and, in general, to extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious, see *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U. S. 1 (1979). Thus, as did the FTC, we evaluate the restraint at issue in this case under the Rule of Reason rather than a rule of *per se* illegality.

Application of the Rule of Reason to these facts is not a matter of any great difficulty. The Federation's policy takes the form of a horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire—the forwarding of x rays to insurance companies along with claim forms. "While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *National Society of Professional Engineers*, *supra*, at 692. A refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them. Absent some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services, see *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, *supra; Chicago Board of Trade*, *supra;* cf. *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85 (1984)—such an agreement limiting consumer choice by impeding the "ordinary give and take of the market place," *National Society of Professional Engineers*, *supra*, at 692, cannot be sustained under the Rule of Reason. No credible argument has been advanced for the proposition that making it more costly for the insurers and patients who are the dentists' customers to obtain information needed for evaluating the dentists' diagnoses has any such procompetitive effect.

The Federation advances three principal arguments for the proposition that, notwithstanding its lack of competitive virtue, the Federation's policy of withholding x rays should not be deemed an unreasonable restraint of trade. First, as did the Court of Appeals, the Federation suggests that in the absence of specific findings by the Commission concerning the definition of the market in which the Federation allegedly restrained trade and the power of the Federation's members in that market, the conclusion that the Federation unreasonably restrained trade is erroneous as a matter of law, regardless of whether the challenged practices might be impermissibly anticompetitive if engaged in by persons who together possessed power in a specifically defined market. This contention, however, runs counter to the Court's holding in *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, *supra*, that "[a]s a matter of law, the absence of proof of market power does not justify a naked restriction on price or output," and that such a restriction "requires some competitive justification even in the absence of a detailed market analysis." *Id.*, at 109–110. Moreover, even if the restriction imposed by the Federation is not sufficiently "naked" to call this principle into play, the Commission's failure to engage in detailed market analysis is not fatal to its finding of a violation of the Rule of Reason. The Commission found that in two localities in the State of Indiana (the Anderson and Lafayette areas), Federation dentists constituted heavy majorities of the practicing dentists and that as a result of the efforts of the Federation, insurers in those areas were, over a period of years, actually unable to obtain compliance with their requests for submission of x rays. Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, "proof of actual detrimental effects, such as a reduction of output," can obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effects." 7 P. Areeda, Antitrust Law ¶1511, p. 429 (1986). In this case, we conclude that the finding of actual, sustained adverse effects on competition in those areas where IFD dentists predominated, viewed in light of the reality that markets for dental services tend to be relatively localized, is legally sufficient to support a finding that the challenged restraint was unreasonable even in the absence of elaborate market analysis.[3]

Second, the Federation, again following the lead of the Court of Appeals, argues that a holding that its policy of withholding x rays constituted an unreasonable restraint of trade is precluded by the Commission's failure to make any finding that the policy resulted in the provision of dental services that were more costly than those that the patients and their insurers would have chosen were they able to evaluate x rays in conjunction with claim forms. This argument, too, is unpersuasive. Although it is true that the goal of the insurers in seeking submission of x rays for use in their review of benefits claims was to minimize costs by choosing the least expensive adequate course of dental treatment, a showing that this goal was actually achieved through the means chosen is not an essential step in establishing that the dentists' attempt to thwart its achievement by collectively refusing to supply the requested information was an unreasonable restraint of trade. A concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost justified is likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices or, as here, the purchase of higher priced services, than would occur in its absence. *National Society of Professional Engineers* v. *United States*, 435 U. S. 679 (1978). Moreover, even if the desired information were in fact completely useless to the insurers and their patients in making an informed choice regarding the least costly adequate course of treatment—or, to put it another way, if the costs of evaluating the information were far greater than the cost savings resulting from its use—the Federation would still not be justified in deciding on behalf of its members' customers that they did not need the information: presumably, if that were the case, the discipline of the market would itself soon result in the insurers' abandoning their requests for x rays. The Federation is not entitled to pre-empt the working of the market by deciding for itself that its customers do not need that which they demand.

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[3] Because we find that the Commission's findings can be sustained on this basis, we do not address the Commission's contention that the Federation's activities can be condemned regardless of market power or actual effect merely because they constitute a continuation of the restraints formerly imposed by the Indiana Dental Association, which allegedly had market power throughout the State of Indiana.

Third, the Federation complains that the Commission erred in failing to consider, as relevant to its Rule of Reason analysis, noncompetitive "quality of care" justifications for the prohibition on provision of x rays to insurers in conjunction with claim forms. This claim reflects the Court of Appeals' repeated characterization of the Federation's policy as a "legal, moral, and ethical policy of quality dental care, requiring that insurers examine and review all diagnostic and clinical aids before formulating a proper course of dental treatment." 745 F. 2d, at 1144. The gist of the claim is that x rays, standing alone, are not adequate bases for diagnosis of dental problems or for the formulation of an acceptable course of treatment. Accordingly, if insurance companies are permitted to determine whether they will pay a claim for dental treatment on the basis of x rays as opposed to a full examination of all the diagnostic aids available to the examining dentist, there is a danger that they will erroneously decline to pay for treatment that is in fact in the interest of the patient, and that the patient will as a result be deprived of fully adequate care.

The Federation's argument is flawed both legally and factually. The premise of the argument is that, far from having no effect on the cost of dental services chosen by patients and their insurers, the provision of x rays will have too great an impact: it will lead to the reduction of costs through the selection of inadequate treatment. Precisely such a justification for withholding information from customers was rejected as illegitimate in the *National Society of Professional Engineers* case. The argument is, in essence, that an unrestrained market in which consumers are given access to the information they believe to be relevant to their choices will lead them to make unwise and even dangerous choices. Such an argument amounts to "nothing less than a frontal assault on the basic policy of the Sherman Act." *National Society of Professional Engineers, supra,* at 695. Moreover, there is no particular reason to believe that the provision of information will be more harmful to consumers in the market for dental services than in other markets. Insurers deciding what level of care to pay for are not themselves the recipients of those services, but it is by no means clear that they lack incentives to consider the welfare of the patient as well as the minimization of costs. They are themselves in competition for the patronage of the patients—or, in most cases, the unions or businesses that contract on their behalf for group insurance coverage—and must satisfy their potential customers not only that they will provide coverage at a reasonable cost, but also that that coverage will be adequate to meet their customers' dental needs. There is thus no more reason to expect dental insurance companies to sacrifice quality in return for cost savings than to believe this of consumers in, say, the market for engineering services. Accordingly, if noncompetitive quality-of-service justifications are inadmissible to justify the denial of information to consumers in the latter market, there is little reason to credit such justifications here.

In any event, the Commission did not, as the Federation suggests, refuse even to consider the quality-of-care justification for the withholding of x rays. Rather, the Commission held that the Federation had failed to introduce sufficient evidence to establish such a justification: "IFD has not pointed to any evidence—or even argued—that any consumers have in fact been harmed by alternative benefits determinations, or that actual determinations have been medically erroneous." 101 F. T. C., at 177. The evidence before the Administrative Law Judge on this issue appears to have consisted entirely of expert opinion testimony, with the Federation's experts arguing that x rays generally provide an insufficient basis, standing alone, for dental diagnosis, and the Commission's experts testifying that x rays may be useful in assessing diagnosis of and appropriate treatment for a variety of dental complaints. *Id.*, at 128–132. The Commission was amply justified in concluding on the basis of this conflicting evidence that even if concern for the quality of patient care could under some circumstances serve as a justification for a restraint of the sort imposed here, the evidence did not support a finding that the careful use of x rays as a basis for evaluating insurance claims is in fact destructive of proper standards of dental care.[4]

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[4] It is undisputed that lay claims examiners employed by insurance companies have no authority to deny claims on the basis of examination of x rays; rather, initial screening of x rays serves only as a means of identifying cases that merit further scrutiny by the licensed dentists serving as consultants to the insurers. Any recommendation that benefits be denied or a less expensive course of treatment be pursued is based on the professional judgment of a licensed dentist that the materials available to him—x rays, claim forms, and whatever further diagnostic aids he chooses to consult—are sufficient to indicate that the treating dentist's recommendation is not necessary to the health of the patient. There is little basis for concluding that, where such a divergence of professional judgment exists, the treatment recommendation made by the patient's dentist should be

In addition to arguing that its conspiracy did not effect an unreasonable restraint of trade, the Federation appears to renew its argument, pressed before both the Commission and the Court of Appeals, that the conspiracy to withhold x rays is immunized from antitrust scrutiny by virtue of a supposed policy of the State of Indiana against the evaluation of dental x rays by lay employees of insurance companies. See Brief for Respondent 25–26, and n. 10. Allegedly, such use of x rays by insurance companies—even where no claim was actually denied without examination of an x ray by a licensed dentist—would constitute unauthorized practice of dentistry by the insurance company and its employees. The Commission found that this claim had no basis in any authoritative source of Indiana law, see 101 F. T. C., at 181–183, and the Federation has not identified any adequate reason for rejecting the Commission's conclusion. Even if the Commission were incorrect in its reading of the law, however, the Federation's claim of immunity would fail. That a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it. See *Fashion Originators' Guild of America, Inc.* v. *FTC*, 312 U. S. 457, 468 (1941). Anticompetitive collusion among private actors, even when its goal is consistent with state policy, acquires antitrust immunity only when it is actively supervised by the State. See *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U. S. 48, 57 (1985). There is no suggestion of any such active supervision here; accordingly, whether or not the policy the Federation has taken upon itself to advance is consistent with the policy of the State of Indiana, the Federation's activities are subject to Sherman Act condemnation.

V

The factual findings of the Commission regarding the effect of the Federation's policy of withholding x rays are sup-

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assumed to be the one that in fact represents the best interests of the patient.

ported by substantial evidence, and those findings are sufficient as a matter of law to establish a violation of § 1 of the Sherman Act, and, hence, § 5 of the Federal Trade Commission Act. Since there has been no suggestion that the cease-and-desist order entered by the Commission to remedy this violation is itself improper for any reason distinct from the claimed impropriety of the finding of a violation, the Commission's order must be sustained. The judgment of the Court of Appeals is accordingly

Reversed.

BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. v. CITY OF NEW YORK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 84–1923. Argued February 26, 1986—Decided June 2, 1986

The Social Security Act provides benefits to disabled persons under two programs administered by the Social Security Administration (SSA): the Social Security Disability Insurance Program (SSD) and the Supplemental Security Income Program (SSI). Regulations for both programs establish a five-step "sequential evaluation" process for determining eligibility for benefits. The initial determination of whether an individual is disabled is made by a state agency under the authority and control of the Secretary of Health and Human Services (Secretary). This determination is subject to review by the SSA. The disappointed claimant is then afforded a three-stage administrative review process. Proceeding through these three stages exhausts the claimant's administrative remedies. Thereafter, he may seek judicial review in Federal District Court, but must do so within 60 days of the Secretary's final decision as required by 42 U. S. C. § 405(g). Respondents brought a class action against the Secretary and the Commissioner of the SSA, seeking relief on behalf of all individuals residing in New York who had, within a specified time period, been denied disability benefits or whose benefits were terminated pursuant to an allegedly illegal internal policy of the Secretary. The District Court certified the class as including claimants who had not complied with the 60-day requirement for seeking judicial review and other claimants who had not exhausted their administrative remedies and obtained a final decision of the Secretary as required by § 405(g). Holding that the policy in question was illegal, the District Court ordered the Secretary to reopen the decisions denying or terminating benefits and to redetermine eligibility. The Court of Appeals affirmed.

Held:

1. The District Court properly included in the class claimants who had received a final decision from the Secretary but did not seek judicial review within the statutory 60-day period. The 60-day requirement is not jurisdictional but rather constitutes a statute of limitations. Equitable tolling of that requirement is consistent with Congress' intent in enacting § 405(g), and on the facts of this case the equities are in favor of tolling. Tolling serves the Act's purpose where the internal policy

prevented the claimants from knowing of a violation of their rights. Pp. 478–482.

2. The District Court also properly included in the class claimants who failed to exhaust their administrative remedies. The court did not err in waiving exhaustion not only as to those claimants whose time to pursue further administrative appeals had lapsed but also as to those who still had time to pursue administrative remedies at the time the suit was filed. For claimants whose time to pursue further remedies had lapsed, exhaustion is excused for the same reasons requiring tolling of the 60-day statute of limitations. Since the claimants could not attack a policy of which they were unaware, it would be unfair to penalize them for not exhausting under such circumstances. It was also proper to waive the exhaustion requirement with respect to those claimants who still had time to file suit. The claims in the suit are collateral to the claims for benefits that class members had presented administratively. The class members neither sought nor were awarded benefits in the District Court, but rather challenged the Secretary's failure to follow the regulations. Moreover, the claimants would be irreparably injured if the exhaustion requirement were now enforced against them. The relief afforded by the District Court was fully consistent with the policies underlying exhaustion. Pp. 482–486.

742 F. 2d 729 and 755 F. 2d 31, affirmed.

POWELL, J., delivered the opinion for a unanimous Court.

Edwin S. Kneedler argued the cause for petitioners. With him on the briefs were *Solicitor General Fried*, *Assistant Attorney General Willard*, *Deputy Solicitor General Geller*, *William Kanter*, and *Howard S. Scher*.

Frederick A. O. Schwarz, Jr., argued the cause for respondents. With him on the brief were *Frederick P. Schaffer*, *Michael D. Young*, *Robert Abrams*, Attorney General of New York, *Robert Hermann*, Solicitor General, *Paul M. Glickman* and *Andrea Green*, Assistant Attorneys General, *Leonard S. Rubenstein*, *Ambrose Doskow*, and *Richard L. Claman*.*

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*Briefs of *amici curiae* urging affirmance were filed for the State of Alabama et al. by *Neil F. Hartigan*, Attorney General of Illinois, *Roma J. Stewart*, Solicitor General, *Charles A. Graddick*, Attorney General of Alabama, *Steve Clark*, Attorney General of Arkansas, *Jim Smith*, Attorney General of Florida, *Corinne K. A. Watanabe*, Attorney General

JUSTICE POWELL delivered the opinion of the Court.

This class action was brought pursuant to 42 U. S. C. § 405(g) challenging an internal policy of the Secretary of Health and Human Services that had the effect of denying disability benefits to numerous claimants who may have been entitled to them. The issues presented are whether the District Court correctly included within the class (i) claimants who had received a final decision on their individual claims for benefits more than 60 days prior to the filing of this action, and (ii) other claimants who had not exhausted their administrative remedies.

I

The Federal Government provides benefits to disabled persons under two distinct programs administered by the Social Security Administration (SSA). The Social Security

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of Hawaii, *Thomas J. Miller*, Attorney General of Iowa, *David L. Armstrong*, Attorney General of Kentucky, *William J. Guste, Jr.*, Attorney General of Louisiana, *James E. Tierney*, Attorney General of Maine, *Stephen H. Sachs*, Attorney General of Maryland, *Hubert H. Humphrey III*, Attorney General of Minnesota, *Vicki Sleeper*, Special Assistant Attorney General, *Edward Lloyd Pittman*, Attorney General of Mississippi, *William L. Webster*, Attorney General of Missouri, *Robert M. Spire*, Attorney General of Nebraska, *Brian McKay*, Attorney General of Nevada, *W. Cary Edwards*, Attorney General of New Jersey, *Paul Bardacke*, Attorney General of New Mexico, *Nicholas Spaeth*, Attorney General of North Dakota, *Michael C. Turpen*, Attorney General of Oklahoma, *Mark V. Meierhenry*, Attorney General of South Dakota, *Jim Mattox*, Attorney General of Texas, *Charles G. Brown*, Attorney General of West Virginia, *Bronson C. La Follette*, Attorney General of Wisconsin, and *A. G. McClintock*, Attorney General of Wyoming; for the City of Chicago by *James D. Montgomery;* for the American Bar Association by *William W. Falsgraf* and *John H. Pickering;* for the American Civil Liberties Union et al. by *Burt Neuborne* and *Charles S. Sims;* for the American Psychiatric Association by *Joel I. Klein;* for the Association of the Bar of the City of New York by *Robert B. McKay, Sheldon H. Elsen, John F. K. Cassidy, Peter L. Zimroth, Alexander R. Sussman, Robinson B. Lacy,* and *John C. Sullivan;* and for the National Institute of Municipal Law Officers by *Roy D. Bates, William I. Thornton, Jr., John W. Witt, Roger F. Cutler,* and *George Agnost.*

Disability Insurance Program (SSD) established by Title II of the Social Security Act, 49 Stat. 622, as amended, 42 U. S. C. § 401 *et seq.*, pays benefits to disabled persons who have contributed to the program and who suffer from a mental or physical disability. The Supplemental Security Income Program (SSI) established by Title XVI of the Act, 86 Stat. 1465, as amended, 42 U. S. C. § 1381, provides benefits to indigent disabled persons. Both statutes define "disability" as the "inability to engage in any substantial gainful activity. . . ." §§ 423(d)(1)(A), 1382c(a)(3)(A). An individual is found to be under a disability only if "his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." §§ 423(d)(2)(A), 1382c(a)(3)(B).

Pursuant to statutory authority, the Secretary of Health and Human Services (Secretary) has adopted complex regulations governing eligibility for SSD and SSI payments. 20 CFR pt. 404, subpart P (1985) (SSD); 20 CFR pt. 404, pt. 416, subpart I (1985) (SSI). The regulations for both programs are essentially the same and establish a five-step "sequential evaluation" process. The first step determines whether the claimant is engaged in "substantial gainful activity." If he is, benefits are denied. 20 CFR §§ 404.-1520(a),(b), 416.920(a),(b) (1985). If he is not engaged in such activity, the process moves to the second step, which decides whether the claimant's condition or impairment is "severe"—*i. e.*, one that significantly limits his physical or mental ability to do basic work activities. If the impairment is not severe, benefits are denied. §§ 404.1520(c), 416.920(c). If the impairment is severe, the third step determines whether the claimant's impairments meet or equal those set forth in the "Listing of Impairments" (listings) contained in subpart P, appendix 1, of the regulations, 20 CFR §§ 404.1520(d), 416.920(d). The listings consist of specified impairments acknowledged by the Secretary to be of sufficient severity to preclude gainful employment. If a claimant's condition meets or equals the listed impairments, he is conclusively presumed to be disabled and entitled to benefits. If the claimant's impairments are not listed, the process moves to the fourth step, which assesses the individual's "residual functional capacity" (RFC); this assessment measures the claimant's capacity to engage in basic work activities. If the claimant's RFC permits him to perform his prior work, benefits are denied. §§404.1520(e), 416.920(e).[1] If the claimant is not capable of doing his past work, a decision is made under the fifth and final step whether, in light of his RFC, age, education, and work experience, he has the capacity to perform other work. §§404.1520(f), 416.920(f). If he does not, benefits are awarded.

The determination whether an individual is disabled is made initially by a state agency acting under the authority and control of the Secretary. 42 U. S. C. §§421(a), 1383b(a); 20 CFR §§404.1503, 416.903 (1985); see *Heckler* v. *Day*, 467 U. S. 104, 106, and n. 4 (1984). All decisions by the state agency are subject to Quality Assurance Reviews by the Regional Office and by the Central Baltimore Offices of SSA. If the responsible SSA officials determine during either review that a state agency erred, the case is "returned" to the State for correction.

The disappointed claimant is afforded a three-stage administrative review process beginning with *de novo* reconsideration by the State of the initial determination. 20 CFR

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[1] The RFC assessment is made by a review physician employed by the state agency under contract with SSA. His written conclusion becomes part of the administrative record of the claim. See, *e. g.*, Plaintiffs' Ex. 50, p. 10; App. 148, 158; Record Doc. No. 73; Tr. 27. The District Court found that this assessment is generally given great weight by the administrative law judge on later review. *City of New York* v. *Heckler*, 578 F. Supp. 1109, 1125 (EDNY 1984).

§§404.909(a)(1), 416.1409(a) (1985). If a claimant is dissatisfied with the state agency's decision on reconsideration, he is entitled to a hearing by an administrative law judge (ALJ) within SSA's Office of Hearings and Appeals. 42 U. S. C. §405(b)(1) (1982 ed., Supp. II), 42 U. S. C. §1383(c)(1); 20 CFR §§404.929, 416.1429, 422.201 *et seq.* (1985).[2]

If the ALJ's decision is adverse to the claimant, the claimant may then seek review by the Appeals Council. 20 CFR §§404.967–404.983, 416.1467–416.1483 (1985). Proceeding through these three stages exhausts the claimant's administrative remedies. Following the determination at each stage, a disappointed claimant is notified that he must proceed to the next stage within 60 days of notice of the action taken or the decision will be considered binding. *E. g.*, 20 CFR §§404.905, 404.909(a)(1), 416.1405, 416.1409(a), 404.955(a), 404.968(a)(1), 416.1455(a), 416.1468(a) (1985). Thereafter, he may seek judicial review in federal district court, pursuant to 42 U. S. C. §405(g). See 42 U. S. C. §§421(d), 1383(c)(3); 20 CFR §§404.900(a)(5), 404.981, 416.1400(a)(5), 416.1481, 422.210 (1985).[3]

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[2] The Secretary has not provided for a separate reconsideration stage in disability cessation cases under Title XVI. An SSI recipient whose benefits are terminated, therefore, is entitled to proceed directly to an ALJ hearing if he requests one within 60 days of the initial determination. 20 CFR §§416.1407, 416.1415 (1985).

[3] Title 42 U. S. C. §405(g), provides in part:

"Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the

II

On February 8, 1983, respondents the City of New York, the New York City Health and Hospitals Corporation, and two state officials, suing on their own behalf and as *parens patriae*, together with eight named individuals, brought this class action against the Secretary and the Commissioner of SSA. They sought relief on behalf of all individuals residing in the State who had applied for or received SSD or SSI benefits on or after April 1, 1980, who had been found by petitioners to have a severe mental impairment, and whose applications for benefits either had been or were to be denied, or whose benefits had been or were to be terminated, based on petitioners' determination that the claimants were capable of substantial gainful employment.

The gravamen of respondents' complaint was that petitioners had adopted an unlawful, unpublished policy under which countless deserving claimants were denied benefits. They contended that the policy mandated a presumption—applicable at the level of the initial state psychiatric assessment—that a failure to meet or equal the listings was tantamount to a finding of ability to do at least unskilled work; that the presumption led to routine denials of benefits to eligible claimants; and that such a presumption was arbitrary, capricious, and violative of the Constitution, the Social Security Act, and the applicable regulations. Respondents claimed that this internal policy had the effect of eliminating steps four and five from the sequential evaluation process, and thus ignored the requirement for an individualized RFC assessment to determine whether a claimant with a severe condition is nonetheless able to work. They alleged that the policy was never published in the Federal Register as required by the Administrative Procedure Act, but was nonetheless imple-

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pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive . . . ."

mented through various internal memoranda and the "returns" process by which SSA sends cases back to the States for correction. Respondents contended that failure to make the policy known to claimants denied the individual plaintiffs and class members due process of law.

A

Following a 7-day trial, the District Court held that from 1978 until at least the early months of 1983,[4] SSA followed the covert policy alleged by respondents and that the policy was illegal. *City of New York* v. *Heckler*, 578 F. Supp. 1109, 1115 (EDNY 1984). The court noted that the "Act and its regulations require the Secretary to make a realistic, individual assessment of each claimant's ability to engage in substantial gainful activity. See *Heckler v. Campbell*, [461 U. S. 458] (1983). The class plaintiffs did not receive that assessment." *Id.*, at 1124.[5] Rather, as respondents al-

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[4] The District Court noted that in 1983 SSA "yielded to pressure to allow medical vocational allowances for those with mental disabilities. The change was precipitated only after the filing of this lawsuit and after a preliminary injunction was issued on December 22, 1982, in the case of *Mental Health Association of Minnesota v. Schweiker*, 554 F. Supp. 157 (D. Minn. 1982), *aff'd*, 720 F. 2d 965 (8th Cir. 1983)." 578 F. Supp., at 1115.

[5] The District Court added:

"On the contrary, SSA relied on bureaucratic instructions rather than individual assessments and overruled the medical opinions of its own consulting physicians that many of those whose claims they were instructed to deny could not, in fact, work. Physicians were pressured to reach 'conclusions' contrary to their own professional beliefs in cases where they felt, at the very least, that additional evidence needed to be gathered in the form of a realistic work assessment. The resulting supremacy of bureaucracy over professional medical judgments and the flaunting of published, objective standards is contrary to the spirit and letter of the Social Security Act.

"The Secretary's practices have violated the requirements of her own regulations. Defendants have ignored the five step sequential evaluation process by presuming that the failure to meet listings at step three or four of the process automatically translates into a residual functional capacity to do unskilled work at steps four and five. The bureaucratic assessment of leged, SSA had consistently "followed a policy which presumes that mentally disabled claimants who do not meet or equal the listings necessarily retain sufficient residual functional capacity to do at least 'unskilled work.'" *Id.*, at 1115. The District Court further found that these tainted RFC assessments by state review physicians were subsequently given "great weight" by ALJ's in the administrative appeal process. *Id.*, at 1125. Moreover, "[t]he means of enforcement of the policy, through internal memoranda, returns, and reviews, has meant that the affected SSD or SSI applicant as well as counsel, social workers and advisers for a long time were unaware of its existence." *Id.*, at 1115. The court stated that evidence of the "fixed clandestine policy against those with mental illness" was overwhelming. *Ibid.*

The District Court certified a class,[6] and decided that the class properly included claimants who had not exhausted administrative remedies. Relying on *Mathews* v. *Eldridge*,

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residual functional capacity if it was done at all was reduced to a paper charade where the SSA physician completed a cursory report or checked off a form knowing the conclusion had to be that the claimant had the capacity for unskilled work. Medical experts demonstrated to the court that the symptoms and restrictions of the listings of impairments do not measure an individual's capacity for work or his or her ability to withstand the stress of even the least demanding work." *Id.*, at 1124.

[6] The class was ultimately defined by the District Court after trial as consisting of:

"All individuals residing in the State of New York who have applied for or received Title II and/or Title XVI benefits and who, between April 1, 1980 and May 15, 1983, were found by the New York Office of Disability Determinations to have a functional psychotic or functional nonpsychotic mental impairment which is severe (i. e., determined under 20 CFR § 404.1520(c) or § 416.930(c) to require evaluation under Appendix I of that Regulation), and whose applications for benefits have been denied or whose benefits have been or will be terminated, on the basis of defendants' determination that such persons are capable of substantial gainful activity." App. to Pet. for Cert. 65a.

The class is estimated to include more than 50,000 New York residents. *City of New York* v. *Heckler*, 742 F. 2d 729, 731 (CA2 1984).

424 U. S. 319 (1976), the court concluded that this was an appropriate case in which to waive the statutory exhaustion requirement. In the court's view, both parts of the *Eldridge* test were satisfied here: the claims were collateral to any claim for benefits, and the harm imposed by exhaustion would be irreparable.

Similarly, the District Court decided that the class properly included those who had not complied with the requirement that a claimant seek judicial review within 60 days of the Secretary's final decision or "within such further time as the Secretary may allow." 42 U. S. C. § 405(g). The court noted that the 60-day requirement is not jurisdictional, but rather is a statute of limitations waivable by the parties. *Mathews* v. *Eldridge, supra,* at 328, n. 9; *Weinberger* v. *Salfi,* 422 U. S. 749, 763–764 (1975). Observing that petitioners had made no argument concerning this requirement until their post-trial brief, the court found that "the same reasons which justify implying waiver of the exhaustion requirement are stronger for the sixty day requirement because the statute of limitations is not, as is the exhaustion requirement, 'central to the requisite grant of subject-matter jurisdiction.' *Weinberger* v. *Salfi,* 422 U. S. 749, 764 . . . (1975)." 578 F. Supp., at 1124.

As a remedy, the District Court ordered the Secretary to reopen the decisions denying or terminating benefits, and to redetermine eligibility. As interim relief, the court directed the Secretary to reinstate benefits of all class members who had previously been entitled to benefits but who were subsequently terminated, until the claimant's eligibility was properly determined.[7]

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[7] The District Court also ordered SSA to notify class members that their claims had been reopened, and to inform class members with an appeal pending before an ALJ that such claimants had the option of proceeding with their appeals upon the existing record rather than with the administrative reopening of their case. App. to Pet. for Cert. 65a–66a.

B

The Court of Appeals for the Second Circuit affirmed. *City of New York* v. *Heckler*, 742 F. 2d 729 (1984). On appeal petitioners did not challenge the District Court's findings of fact or ruling on the merits, but only raised contentions respecting the District Court's definition of the appropriate class, and the interim relief awarded.[8] With respect to the composition of the class, petitioners asserted that the District Court lacked jurisdiction under § 405(g) over most class members, including (i) claimants who failed to exhaust administrative remedies, and (ii) claimants whose right to pursue administrative or judicial review had lapsed by the time this action was commenced. *Id.*, at 734.

The Court of Appeals rejected petitioners' argument that the District Court lacked jurisdiction over the claims of class members who had failed to exhaust their administrative remedies. It upheld the District Court's finding that the harm caused by the wrongful denials was irreparable. While the court did not believe that the claims were "wholly" collateral to claims for benefits, it was satisfied that the class was complaining "fundamentally of a procedural irregularity and not of the Secretary's substantive standards of eligibility." *Id.*, at 737. Moreover, the Court of Appeals believed it was significant that the District Court was not asked to and did not rule on the merits of the underlying benefit claims.

The court then rejected petitioners' contention that the District Court should not have included within the class those claimants who failed to seek judicial review within 60 days of an adverse decision by the Secretary. The court agreed with the District Court that the 60-day limitation is not a jurisdictional requirement, but rather is a statute of limitations. *Id.*, at 738, citing *Eldridge, supra*, at 328, n. 9; *Salfi, supra*, at 763–764. The Secretary's secretive conduct justified tolling the period "during the time that SSA's policy of applying the challenged presumption concerning residual functional capacity remained operative but undisclosed." 742 F. 2d, at 738.[9]

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[8] The Court of Appeals affirmed the District Court's award of interim relief, and petitioners have raised in this Court no issue respecting that portion of the Court of Appeals' decision.

On petition for rehearing, the same panel of the Court of Appeals, per Judge Newman, denied rehearing and in so doing rejected petitioners' argument that passage of the Social Security Disability Benefits Reform Act of 1984, Pub. L. 98–460, 98 Stat. 1794, required the court to alter its holding with respect to the effect of class members' failure to comply with § 405(g). *City of New York* v. *Heckler*, 755 F. 2d 31 (1985). The Secretary sought a writ of certiorari from this Court. We granted certiorari, 474 U. S. 815 (1985), and now affirm.

III

Petitioners renew here arguments rejected by the Court of Appeals. They challenge on jurisdictional grounds inclusion in the class of two groups of claimants: those who failed to bring a court action within 60 days of a final decision of the Secretary, and those who failed to exhaust administrative remedies. We first consider the requirement embodied in § 405(g) that claims must be presented in the District Court within 60 days of a final decision of the Secretary. Petitioners contend that the provision sets the bounds of the District Court's jurisdiction. This argument is foreclosed by two of our prior decisions that have declared that the 60-day requirement is not jurisdictional, but rather constitutes a period of limitations. *Eldridge*, *supra*, at 328, n. 9; *Salfi*, *supra*, at 764.[10]

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[9] As an alternative basis for jurisdiction, the Court of Appeals relied on 28 U. S. C. § 1361 "in the event that, upon further review, it is determined that section 405(g) jurisdiction is unavailable to some of the class members." 742 F. 2d, at 739. Because we conclude that jurisdiction under § 405(g) is available, we do not reach the issue whether mandamus jurisdiction would have been proper in this context.

[10] We reject petitioners' contention that *Salfi* and *Eldridge* do not stand for the proposition that the 60-day requirement is not jurisdictional. In both cases, jurisdiction was premised on § 405(g), and we noted that we did

Petitioners next contend that if the 60-day limit is a statute of limitations, it is a condition on the waiver of sovereign immunity and thus must be strictly construed. We have no difficulty agreeing with that statement. See *Block* v. *North Dakota*, 461 U. S. 273, 287 (1983). Accepting this proposition, however, does not answer the question whether equitable tolling can be applied to this statute of limitations, for in construing the statute we must be careful not to "assume the authority to narrow the waiver that Congress intended," *United States* v. *Kubrick*, 444 U. S. 111, 118 (1979), or construe the waiver "unduly restrictively." *Block*, *supra*, at 287. In *Honda* v. *Clark*, 386 U. S. 484 (1967), the Court held that where consistent with congressional intent, and called for by the facts of the case, it would "apply a traditional equitable tolling principle . . . ." *Id.*, at 501.[11] Petitioners argue that *Honda* stands for the proposition that equitable tolling is permissible only in cases in which the public treasury is not directly affected. We decline to hold that the doctrine of equitable tolling is so limited. When application of the doctrine is consistent with Congress' intent in enacting a particular statutory scheme, there is no justification for limiting the doctrine to cases that do not involve monetary relief.

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not have to consider whether the 60-day requirement had been satisfied because the issue had not been timely raised below. *Eldridge*, 424 U. S., at 328, n. 9; *Salfi*, 422 U. S., at 764. Were the requirement jurisdictional, of course, the Court could not have declined to consider whether it had been satisfied in those cases.

[11] In *Honda* v. *Clark*, United States citizens or residents of Japanese descent sought to recover funds vested under the Trading with the Enemy Act, 40 Stat. 411, 50 U. S. C. App. § 1 *et seq.* Under that Act the United States seized the American assets of businesses owned by Japanese nationals. After the war a mechanism was established to return the assets to their rightful owners or the owners' creditors. The central problem in that case revolved around the fact that the petitioners failed to file a lawsuit challenging a schedule of payments within the applicable 60-day time period. This Court allowed the limitations period to be tolled during the pendency of related litigation because it was consistent with the statutory scheme and equitable principles to do so. 386 U. S., at 501.

We must determine, therefore, whether equitable tolling is consistent with Congress' intent in enacting § 405(g), and whether tolling is appropriate on these facts. The statute of limitations we construe in this case is contained in a statute that Congress designed to be "unusually protective" of claimants. *Heckler* v. *Day*, 467 U. S., at 106. Moreover, Congress has authorized the Secretary to toll the 60-day limit,[12] thus expressing its clear intention to allow tolling in some cases. While in most cases the Secretary will make the determination whether it is proper to extend the period within which review must be sought, cases may arise where the equities in favor of tolling the limitations period are "so great that deference to the agency's judgment is inappropriate." *Eldridge*, 424 U. S., at 330. As in *Honda* v. *Clark*, we conclude that application of a "traditional equitable tolling principle" to the 60-day requirement of § 405(g) is fully "consistent with the overall congressional purpose" and is "nowhere eschewed by Congress." 386 U. S., at 501.

We conclude, moreover, that on these facts the equities in favor of tolling are compelling. As the Court of Appeals explained:

> "All of the class members who permitted their administrative or judicial remedies to expire were entitled to believe that their Government's determination of ineligibility was the considered judgment of an agency faithfully executing the laws of the United States. Though they knew of the denial or loss of benefits, they did not and could not know that those adverse decisions had

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[12] SSA's regulations governing extensions of time for filing are based on considerations of fairness to claimants. Thus, the Secretary may grant an extension where a suit was not timely filed because of illness, accident, destruction of records, or mistake. Similarly, an extension may be granted where the claimant misunderstands the appeal process or is unable timely to collect necessary information, or where the Secretary undertook action that "misled" the claimant concerning his right to review. 20 CFR §§ 404.911, 416.1411 (1985). The fairness concerns underlying the regulations support our application of equitable tolling in this case.

> been made on the basis of a systematic procedural irregularity that rendered them subject to court challenge. Where the Government's secretive conduct prevents plaintiffs from knowing of a violation of rights, statutes of limitations have been tolled until such time as plaintiffs had a reasonable opportunity to learn the facts concerning the cause of action. Since in this case the full extent of the Government's clandestine policy was uncovered only in the course of this litigation, all class members may pursue this action notwithstanding the 60-day requirement." 742 F. 2d, at 738 (citations omitted).

In addition to serving its customary purpose,[13] the statute of limitations embodied in § 405(g) is a mechanism by which Congress was able to move cases to speedy resolution in a bureaucracy that processes millions of claims annually. Thus, the limitation serves both the interest of the claimant and the interest of the Government. Tolling, in the rare case such as this, does not undermine the purpose of the 60-day limitations period when viewed in connection with the underlying statute. Rather, it serves the purpose of the Act where, as the Court of Appeals stated, "the Government's secretive conduct prevents plaintiffs from knowing of a violation of rights . . . ." *Ibid.* See also *Heckler* v. *Day*, *supra*, at 106. Tolling of the 60-day limitations period was appropriate in this case, and the District Court properly included in the class claimants who had received a final decision from the Secretary, but who did not seek judicial review within the statutory 60-day time period.

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[13] As we explained in *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538, 554 (1974), statutory limitation periods are

"'designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them'" (quoting *Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342, 348–349 (1944)).

IV

Petitioners also contend that the District Court erred in including in the class those members who failed to obtain a "final decision" from the Secretary as required by § 405(g). To obtain a final decision from the Secretary a claimant is required to exhaust his administrative remedies by proceeding through all three stages of the administrative appeals process. Only a claimant who proceeds through all three stages receives a final decision from the Secretary. At the outset, we note that by the time this lawsuit was filed, it was too late for a large number of class members to exhaust their claims, since expiration of the 60-day time limits for administrative appeals barred further access to the administrative appeals process. See 20 CFR §§ 404.905, 404.909(a)(1), 416.1405, 416.1409(a), 404.955(a), 404.968(a)(1), 416.1455(a), 416.1468(a) (1985). For these claimants, we conclude that exhaustion is excused for the same reasons requiring tolling of the statute of limitations. Since "[m]embers of the class could not attack a policy they could not be aware existed," 578 F. Supp., at 1118; see Part III, *supra*, it would be unfair to penalize these claimants for not exhausting under these circumstances.

At the time the suit was filed, however, some claimants may still have had time to exhaust their administrative remedies. The question remains whether it was permissible to include these claimants in the class. Resolution of this question is aided by cases in which we have been called upon to consider issues of exhaustion under § 405(g). See *Weinberger* v. *Salfi*, 422 U. S. 749 (1975); *Mathews* v. *Eldridge*, *supra; Heckler* v. *Ringer*, 466 U. S. 602 (1984). Our decisions teach that the "final decision" requirement embodied in that section

> "consists of two elements, only one of which is purely 'jurisdictional' in the sense that it cannot be waived by the Secretary in a particular case. The waivable element is the requirement that the administrative remedies prescribed by the Secretary be exhausted. The nonwaivable element is the requirement that a claim for benefits shall have been presented to the Secretary." *Mathews* v. *Eldridge*, 424 U. S., at 328.

Ordinarily, the Secretary has discretion to decide when to waive the exhaustion requirement. But as we held in *Eldridge*, "cases may arise where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate." 424 U. S., at 330.

Two factors influenced the Court's judgment that *Eldridge* was a case in which deference to the agency's determination of finality was not necessary. First, the constitutional challenge brought there was "entirely collateral to [a] substantive claim of entitlement." *Ibid.* Second, the claim rested "on the proposition that full relief cannot be obtained at a postdeprivation hearing." *Id.*, at 331. The petitioner had raised "at least a colorable claim that because of his physical condition and dependency upon the disability benefits, an erroneous termination would damage him in a way not recompensable through retroactive payments." *Ibid.*

The claims in this lawsuit are collateral to the claims for benefits that class members had presented administratively. The class members neither sought nor were awarded benefits in the District Court, but rather challenged the Secretary's failure to follow the applicable regulations.

Moreover, as in *Eldridge*, the claimants in this case would be irreparably injured were the exhaustion requirement now enforced against them. The District Court found that class members not only were denied the benefits they were seeking, but "[t]he ordeal of having to go through the administrative appeal process may trigger a severe medical setback.

Many persons have been hospitalized due to the trauma of having disability benefits cut off. Interim benefits will not adequately protect plaintiffs from this harm. Nor will ultimate success if they manage to pursue their appeals." 578 F. Supp., at 1118. Petitioners do not challenge this finding here, and therefore, like the Court of Appeals, "[w]e have no reason to disturb Chief Judge Weinstein's conclusion that the harm caused by wrongful denials was irreparable." 742 F. 2d, at 736. We should be especially sensitive to this kind of harm where the Government seeks to require claimants to exhaust administrative remedies merely to enable them to receive the procedure they should have been afforded in the first place.

Finally, application of the exhaustion doctrine is "intensely practical." *Eldridge*, *supra*, at 331, n. 11. In *Salfi*, we explained:

> "Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review." 422 U. S., at 765.

The ultimate decision of whether to waive exhaustion should not be made solely by mechanical application of the *Eldridge* factors, but should also be guided by the policies underlying the exhaustion requirement. The purposes of exhaustion would not be served by requiring these class members to exhaust administrative remedies. This case is materially distinguishable from one in which a claimant sues in district court, alleging mere deviation from the applicable regulations in his particular administrative proceeding. In the normal course, such individual errors are fully correctable upon subsequent administrative review since the claimant on appeal will alert the agency to the alleged deviation. Because of the agency's expertise in administering its own regulations, the agency ordinarily should be given the opportunity to review application of those regulations to a particular factual context. Thus, our holding today does not suggest that exhaustion is to be excused whenever a claimant alleges an irregularity in the agency proceedings.

These claimants stand on a different footing from one arguing merely that an agency incorrectly applied its regulation. Rather, the District Court found a systemwide, unrevealed policy that was inconsistent in critically important ways with established regulations. Nor did this policy depend on the particular facts of the case before it; rather, the policy was illegal precisely because it ignored those facts. The District Court found that the policy was being adhered to by state agencies due to pressure from SSA, and that therefore exhaustion would have been futile. Under these unique circumstances, there was nothing to be gained from permitting the compilation of a detailed factual record, or from agency expertise. Cf. *McKart* v. *United States*, 395 U. S. 185, 200 (1969).

In addition, the relief afforded by the District Court is fully consistent with the policies underlying exhaustion. The court did not order that class members be paid benefits. Nor does its decision in any way interfere with the agency's role as the ultimate determiner of eligibility under the relevant statutes and regulations. Indeed, by ordering simply that the claims be reopened at the administrative level, the District Court showed proper respect for the administrative process. It did no more than the agency would have been called upon to do had it, instead of the District Court, been alerted to the charge that an undisclosed procedure was illegal and had improperly resolved innumerable claims.

Petitioners correctly assert that, had class members exhausted administrative remedies, some might have received benefits despite the illegal policy. It also is likely that many may have been disqualified for reasons having nothing to do with the illegal policy. Such observations, however, merely serve to remind us why exhaustion is the rule in the vast majority of cases; they do not aid the Court in deciding when exhaustion should be excused.[14] We hold that the District Court did not err in waiving exhaustion in this case either with respect to those claimants whose time to pursue further administrative appeals had lapsed, or with respect to those claimants who still had time to pursue administrative remedies.

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[14] Petitioners argue that when Congress in 1984 made comprehensive revisions in the disability program in the Social Security Disability Benefits Reform Act of 1984, Pub. L. 98–460, 98 Stat. 1794, it reaffirmed the finality requirement of § 405(g). In § 2(d) of the 1984 Act (98 Stat. 1797), Congress provided for remand to the Secretary, for redetermination under the new statutory medical improvement standard, of the claims of any individuals who were included in a class that had been certified in a case involving medical improvement, whether or not each individual class member had personally satisfied the jurisdictional requirements of § 405(g).

Congress took a different approach in cases involving individuals who have mental impairments. In § 5(a) of the 1984 Act, 98 Stat. 1801, Congress directed the Secretary to develop new standards for the evaluation of mental impairments. It then provided in § 5(c) (98 Stat. 1802) that any person who had sought benefits based on a mental impairment and who was found to be not disabled on or after March 1, 1981, could reapply to the Secretary and be reevaluated under these new standards.

Thus, petitioners argue that these provisions demonstrate that Congress knew how to grant relief to disability claimants who have not satisfied the exhaustion requirement. We agree with the Court of Appeals' observation in its decision denying the petition for rehearing:

"The Reform Act is remedial legislation, enacted principally to be of assistance to large numbers of persons whose disability benefits have been terminated. It would be a perverse view of Congressional intent if we were to infer from this beneficial legislation a determination on the part of Congress to deny other disability claimants the fruits of a judgment entered in their favor after a ruling that their claims had been unlawfully processed by the Secretary. What the Secretary is urging us to hold is that the Reform Act renders the finality and exhaustion requirements of section 405(g) more stringent than they were before the passage of the Act." *City of New York* v. *Heckler*, 755 F. 2d 31, 33 (1985).

V

Government agencies administering complex programs that bridge both state and federal bureaucracies necessarily will take certain actions pursuant to policies unknown to the public. We do not suggest that every internal policy that is found to be inconsistent with legal requirements, and arguably touches upon the outcome of a class of cases, will justify tolling the statute of limitations or excusing exhaustion. But, whatever the outer bounds of our holding today, this case falls well within them. While "hard" cases may arise, this is not one of them.

Moreover, we are aware that administrative inconvenience may result from our decision today. But the Secretary had the capability and the duty to prevent the illegal policy found to exist by the District Court. The claimants here were denied the fair and neutral procedure required by the statute and regulations, and they are now entitled to pursue that procedure. The judgment of the Court of Appeals is affirmed.

It is so ordered.

CITY OF LOS ANGELES ET AL. *v.* PREFERRED COMMUNICATIONS, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85–390. Argued April 29, 1986—Decided June 2, 1986

Respondent sued petitioners, the city of Los Angeles and its Department of Water and Power (DWP), in Federal District Court, alleging, *inter alia*, a violation of its rights under the First Amendment by reason of (1) the city's refusal to grant respondent a cable television franchise on the ground that respondent had failed to participate in an auction for a single franchise in the area and (2) DWP's refusal to grant access to poles or underground conduits used for power lines. The District Court dismissed the complaint for failure to state a claim upon which relief could be granted. The Court of Appeals reversed and remanded for further proceedings.

Held: The complaint should not have been dismissed. The activities in which respondent allegedly seeks to engage plainly implicate First Amendment interests. Through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, respondent seeks to communicate messages on a wide variety of topics and in a wide variety of formats. But where speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests. Thus, where the city has made factual assertions to justify restrictions on cable television franchising and these assertions are disputed by respondent, there must be a fuller development of the disputed factual issues before this Court will decide the legal issues. Accordingly, the case will be remanded to the District Court so that petitioners may file an answer and the material factual disputes may be resolved. Pp. 493–496.

754 F. 2d 1396, affirmed and remanded.

REHNQUIST, J., delivered the opinion for a unanimous Court. BLACKMUN, J., filed a concurring opinion, in which MARSHALL and O'CONNOR, JJ., joined, *post*, p. 496.

Edward J. Perez argued the cause for petitioners. With him on the briefs were *Thomas Bonaventura*, *John Haggerty*, *John H. Garvey*, and *Nicholas P. Miller*.

Harold R. Farrow argued the cause for respondent. With him on the brief were *Sol Schildhause* and *Siegfried Hesse*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Connecticut by *Joseph I. Lieberman*, Attorney General, *Clarine N. Riddle*, Deputy Attorney General, and *William B. Gundling*, Assistant Attorney General; for the city of Brookfield, Wisconsin, by *Harold H. Fuhrman;* for the city of New York by *Paul S. Ryerson, Patrick J. Grant*, and *Hadley W. Gold;* for the city of Palo Alto, California, et al. by *Michael A. Small, Jerome B. Falk, Jr., Steven L. Mayer, Steven F. Nord, Donald S. Greenberg, Mary Jo Levinger, John Sanford Todd, P. Lawrence Klose, Carter J. Stroud, John W. Witt, R. R. Campagna, Jack White, R. K. Fox, Gordon Phillips, Victor Kaleta, Edward J. Cooper, George Agnost, Richard Terzian, J. Robert Flandrick, Roger Picquet, Stanley E. Remelmeyer, James Jackson*, and *Robin Faisant;* for Mountain States Telephone and Telegraph Co. et al. by *Debra T. Yarbrough, Robert W. Barker*, and *L. Andrew Tollin;* for the National Association of Broadcasters by *Michael S. Horne* and *Michael D. Berg;* for the National Federation of Local Cable Programmers et al. by *James N. Horwood, Alan J. Roth, Joseph Van Eaton*, and *Donald Weightman;* for the National Institute of Municipal Law Officers by *Roy D. Bates, William I. Thornton, Jr., John W. Witt, Roger F. Cutler, George Agnost, J. Lamar Shelley, Robert J. Alfton, James K. Baker, Frank B. Gummey III, James D. Montgomery, Clifford D. Pierce, Jr., William H. Taube*, and *Charles S. Rhyne;* for the National League of Cities et al. by *Benna Ruth Solomon* and *Jeffrey H. Howard;* for the Office of Communication of United Church of Christ et al. by *Henry Geller* and *Andrew J. Schwartzman;* and for Wisconsin Bell, Inc., by *Robert A. Christensen, Joan F. Kessler*, and *Floyd S. Keene.*

Briefs of *amici curiae* urging affirmance were filed for the United States et al. by *Solicitor General Fried, Assistant Attorney General Ginsburg*, and *Jack D. Smith;* for the American Cable Publishers Institute, Inc., by *Peter C. Smoot;* for Guam Cable TV by *Richard L. Brown;* for the Mid-America Legal Foundation by *John M. Cannon, Susan W. Wanat*, and *Ann Plunkett Sheldon;* for the Motion Picture Association of America, Inc., by *Richard M. Cooper* and *Walter J. Josiah, Jr.;* for the National Cable Television Association, Inc., by *Brenda L. Fox, Michael S. Schooler*, and *H. Bartow Farr III;* for the National Satellite Cable Association by *Mark J. Tauber* and *Deborah C. Costlow;* for Nor-West Cable Communications Partnership et al. by *David Rosenweig* and *Jerome D. Krings;* for Space, the Satellite Television Industry Association, Inc., by

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Preferred Communications, Inc., sued petitioners City of Los Angeles (City) and the Department of Water and Power (DWP) in the United States District Court for the Central District of California. The complaint alleged a violation of respondent's rights under the First and Fourteenth Amendments, and under §§1 and 2 of the Sherman Act, by reason of the City's refusal to grant respondent a cable television franchise and of DWP's refusal to grant access to DWP's poles or underground conduits used for power lines. The District Court dismissed the complaint for failure to state a claim upon which relief could be granted. See Fed. Rule Civ. Proc. 12(b)(6). The Court of Appeals for the Ninth Circuit affirmed with respect to the Sherman Act, but reversed as to the First Amendment claim. 754 F. 2d 1396 (1985). We granted certiorari with respect to the latter issue, 474 U. S. 979 (1985).

Respondent's complaint against the City and DWP alleged, *inter alia*, the following facts: Respondent asked Pacific Telephone and Telegraph (PT&T) and DWP for permission to lease space on their utility poles in order to provide cable television service in the south central area of Los Angeles. App. 6a. These utilities responded that they would not lease the space unless respondent first obtained a cable television franchise from the City. *Ibid.* Respondent asked the City for a franchise, but the City refused to grant it one, stating that respondent had failed to participate in an auction that was to award a single franchise in the area. *Id.*, at 6a–7a.[1]

Richard L. Brown; and for Tele-Communications, Inc., et al. by *Stuart W. Gold, Robert D. Joffe,* and *Henry J. Gerken.*

Briefs of *amici curiae* were filed for the American Civil Liberties Union et al. by *Charles S. Sims, Burt Neuborne,* and *Paul Hoffman;* for Best View Cablevision, Inc., by *Lawrence S. Bader, Paul R. Grand,* and *Diana Parker;* for UNDA-USA et al. by *Robert L. Stern* and *Patrick F. Geary;* and for Nicholas W. Carlin, *pro se.*

[1] California authorizes municipalities to limit the number of cable television operators in an area by means of a "franchise or license" system, and

The complaint further alleged that cable operators are First Amendment speakers, *id.*, at 3a, that there is sufficient excess physical capacity and economic demand in the south central area of Los Angeles to accommodate more than one cable company, *id.*, at 4a, and that the City's auction process allowed it to discriminate among franchise applicants based on which one it deemed to be the "best." *Id.*, at 6a. Based on these and other factual allegations, the complaint alleged that the City and DWP had violated the Free Speech Clause of the First Amendment, as made applicable to the States by the Fourteenth Amendment, §§ 1 and 2 of the Sherman Act,

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to prescribe "rules and regulations" to protect customers of such operators. See Cal. Gov't Code Ann. § 53066 (West Supp. 1986). Congress has recently endorsed such franchise systems. See Cable Communications Policy Act of 1984, Pub. L. 98–549, 98 Stat. 2779. Pursuant to the authority granted by the State, the City has adopted a provision forbidding the construction or operation of a cable television system within city limits unless a franchise is first obtained. See Los Angeles, Cal., Admin. Code, Art. 13, § 13.62(a) (1979). A city ordinance provides that franchises are to be allotted by auction to the bidder offering "the highest percentage of gross annual receipts" derived from the franchise and "such other compensation or consideration . . . as may be prescribed by the Council in the advertisement for bids and notice of sale." See Los Angeles Ordinance 58,200, § 5.2 (1927).

In October 1982, the City published an advertisement soliciting bids for a cable television franchise in the south central area of Los Angeles. The advertisement indicated that only one franchise would be awarded, and it established a deadline for the submission of bids. App. 91a. It also set forth certain nonfinancial criteria to be considered in the selection process, including the degree of local participation in management or ownership reflecting the ethnic and economic diversity of the franchise area, the capacity to provide 52 channels and two-way communication, the willingness to set aside channels for various public purposes and to provide public access facilities, the willingness to develop other services in the public interest, the criminal and civil enforcement record of the company and its principals, the degree of business experience in cable television or other activities, and the willingness to engage in creative and aggressive affirmative action. *Id.*, at 98a, 101a–102a, 105a, 108a–109a. Respondent did not submit a bid in response to this solicitation, and the franchise was eventually awarded to another cable operator.

the California Constitution, and certain provisions of state law. *Id.*, at 11a–19a.

The City did not deny that there was excess physical capacity to accommodate more than one cable television system. But it argued that the physical scarcity of available space on public utility structures, the limits of economic demand for the cable medium, and the practical and esthetic disruptive effect that installing and maintaining a cable system has on the public right-of-way justified its decision to restrict access to its facilities to a single cable television company. 754 F. 2d, at 1401.

The District Court dismissed the free speech claim without leave to amend for failure to state a claim upon which relief could be granted. See Fed. Rule Civ. Proc. 12(b)(6). It also dismissed the antitrust claims, reasoning that petitioners were immune from antitrust liability under the state-action doctrine of *Parker* v. *Brown*, 317 U. S. 341 (1963). Finally, it declined to exercise pendent jurisdiction over the remaining state claims.

The Court of Appeals for the Ninth Circuit affirmed in part and reversed in part. 754 F. 2d 1396 (1985). It upheld the conclusion that petitioners were immune from liability under the federal antitrust laws. *Id.*, at 1411–1415. But it reversed the District Court's dismissal of the First Amendment claim, and remanded for further proceedings. *Id.*, at 1401–1411. It held that, taking the allegations in the complaint as true, *id.*, at 1399, the City violated the First Amendment by refusing to issue a franchise to more than one cable television company when there was sufficient excess physical and economic capacity to accommodate more than one. *Id.*, at 1401–1405, 1411. The Court of Appeals expressed the view that the facts alleged in the complaint brought respondent into the ambit of cases such as *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974), rather than of cases such as *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367 (1969), and *Members of City Council* v. *Taxpayers for Vincent*, 466 U. S. 789 (1984). 754 F. 2d, at 1403–1411.

We agree with the Court of Appeals that respondent's complaint should not have been dismissed, and we therefore affirm the judgment of that court; but we do so on a narrower ground than the one taken by it. The well-pleaded facts in the complaint include allegations of sufficient excess physical capacity and economic demand for cable television operators in the area which respondent sought to serve.[2] The City, while admitting the existence of excess physical capacity on the utility poles, the rights-of-way, and the like, justifies the limit on franchises in terms of minimizing the demand that cable systems make for the use of public property. The City characterizes these uses as the stringing of "nearly 700 miles of hanging and buried wire and other appliances necessary for the operation of its system." Brief for Petitioners 12. The City also characterizes them as "a permanent visual blight," *ibid.*, and adds that the process of installation and repair of such a system in effect subjects city facilities designed for other purposes to a servitude which will cause traffic delays and hazards and esthetic unsightliness. Respondent in its turn replies that the City does not "provide anything more than speculations and assumptions," and that the City's "legitimate concerns are easily satisfied without the need to limit the right to speak to a single speaker." Brief for Respondent 9.

We of course take the well-pleaded allegations of the complaint as true for the purpose of a motion to dismiss, see, *e. g.*, *Kugler* v. *Helfant*, 421 U. S. 117, 125–126, n. 5 (1975). Ordinarily such a motion frames a legal issue such as the one which the Court of Appeals undertook to decide in this case.

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[2] They also include allegations that the City imposes numerous other conditions upon a successful applicant for a franchise. It is claimed that, entirely apart from the limitation of franchises to one in each area, these conditions violate respondent's First Amendment rights. The Court of Appeals did not reach these contentions, and neither do we.

But this case is different from a case between private litigants for two reasons: first, it is an action of a municipal corporation taken pursuant to a city ordinance that is challenged here, and, second, the ordinance is challenged on colorable First Amendment grounds. The City has adduced essentially factual arguments to justify the restrictions on cable franchising imposed by its ordinance, but the factual assertions of the City are disputed at least in part by respondent. We are unwilling to decide the legal questions posed by the parties without a more thoroughly developed record of proceedings in which the parties have an opportunity to prove those disputed factual assertions upon which they rely.

We do think that the activities in which respondent allegedly seeks to engage plainly implicate First Amendment interests. Respondent alleges:

> "The business of cable television, like that of newspapers and magazines, is to provide its subscribers with a mixture of news, information and entertainment. As do newspapers, cable television companies use a portion of their available space to reprint (or retransmit) the communications of others, while at the same time providing some original content." App. 3a.

Thus, through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, respondent seeks to communicate messages on a wide variety of topics and in a wide variety of formats. We recently noted that cable operators exercise "a significant amount of editorial discretion regarding what their programming will include." *FCC* v. *Midwest Video Corp.*, 440 U. S. 689, 707 (1979). Cable television partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers, and pamphleteers. Respondent's proposed activities would seem to implicate First Amendment interests as do the activities of wireless broadcasters, which were found to fall within the ambit of the First Amendment in *Red Lion Broadcasting Co.* v. *FCC, supra,* at 386, even though the free speech aspects of the wireless broadcasters' claim were found to be outweighed by the Government interests in regulating by reason of the scarcity of available frequencies.

Of course, the conclusion that respondent's factual allegations implicate protected speech does not end the inquiry. "Even protected speech is not equally permissible in all places and at all times." *Cornelius* v. *NAACP Legal Defense & Educational Fund, Inc.*, 473 U. S. 788, 799 (1985). Moreover, where speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests. See, *e. g., Members of City Council* v. *Taxpayers for Vincent, supra,* at 805–807; *United States* v. *O'Brien,* 391 U. S. 367, 376–377 (1968). We do not think, however, that it is desirable to express any more detailed views on the proper resolution of the First Amendment question raised by respondent's complaint and the City's responses to it without a fuller development of the disputed issues in the case. We think that we may know more than we know now about how the constitutional issues should be resolved when we know more about the present uses of the public utility poles and rights-of-way and how respondent proposes to install and maintain its facilities on them.

The City claims that no such trial of the issues is required, because the City need not "generate a legislative record" in enacting ordinances which would grant one franchise for each area of the City. Brief for Petitioners 44. "Whether a limitation on the number of franchises . . . is 'reasonable,'" the City continues, "thus cannot turn on a review of historical facts." *Id.*, at 45. The City supports its contention in this regard by citation to cases such as *United States Railroad Retirement Board* v. *Fritz,* 449 U. S. 166, 179 (1980), and *Schweiker* v. *Wilson,* 450 U. S. 221, 236–237 (1981). Brief for Petitioners 45, n. 52.

The flaw in the City's argument is that both *Fritz* and *Wilson* involved Fifth Amendment equal protection challenges to legislation, rather than challenges under the First Amendment. Where a law is subjected to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force. But cf. *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 459 (1978). This Court "may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgment of expressive activity." *Taxpayers for Vincent*, 466 U. S., at 803, n. 22; *Landmark Communications, Inc* v. *Virginia*, 435 U. S. 829, 843–844 (1978).

We affirm the judgment of the Court of Appeals reversing the dismissal of respondent's complaint by the District Court, and remand the case to the District Court so that petitioners may file an answer and the material factual disputes between the parties may be resolved.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL and JUSTICE O'CONNOR join, concurring.

I join the Court's opinion on the understanding that it leaves open the question of the proper standard for judging First Amendment challenges to a municipality's restriction of access to cable facilities. Different communications media are treated differently for First Amendment purposes. Compare, *e. g.*, *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974), with *FCC* v. *League of Women Voters of California*, 468 U. S. 364, 380 (1984). In assessing First Amendment claims concerning cable access, the Court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis. As this case arises out of a motion to dismiss, we lack factual information about the nature of cable television. Recognizing these considerations, *ante*, at 493–494, the Court does not attempt to choose or justify any particular standard. It simply concludes that, in challenging Los Angeles' policy of exclusivity in cable franchising, respondent alleges a cognizable First Amendment claim.

SOUTH CAROLINA ET AL. *v.* CATAWBA INDIAN TRIBE, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84–782. Argued December 12, 1985—Decided June 2, 1986

In 1760 and 1763, respondent Indian Tribe surrendered to Great Britain its aboriginal territory in return for the right to settle permanently on a 225-square-mile tract of land now located in South Carolina. In 1840, the Tribe conveyed the tract to South Carolina in return for the State's establishing a new reservation for the Tribe. In 1959, Congress, pursuant to its changed policies concerning Indian affairs, enacted the Catawba Indian Tribe Division of Assets Act (Catawba Act) authorizing a division of Catawba tribal assets. Section 5 of that Act provided for revocation of the Tribe's constitution, rendered inapplicable to the Tribe and its members special federal statutory protections for Indians, and made state laws applicable to the Tribe and its members in the same way that they apply to all "other persons or citizens." In 1980, the Tribe brought an action in Federal District Court against petitioners (South Carolina and other claimants to the 225-square-mile tract), seeking possession of the tract and trespass damages for the period of its dispossession on the ground that the 1840 conveyance to South Carolina was null and void because the United States never consented to it as required by the Nonintercourse Act to make it effective. The District Court granted summary judgment for petitioners, in part on the ground that the Tribe's claim was barred by the South Carolina statute of limitations. The Court of Appeals reversed, holding that, under its interpretation of the Catawba Act, the state statute of limitations did not apply.

Held: The explicit redefinition of the relationship between the Federal Government and respondent Tribe reflected in the Catawba Act's clear language requires the application of the state statute of limitations to the Tribe's claim. But whether that statute bars the claim should be determined by the Court of Appeals on remand. Pp. 506–511.

740 F. 2d 305, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which MARSHALL and O'CONNOR, JJ., joined, *post*, p. 511.

James D. St. Clair argued the cause for petitioners. With him on the briefs were *James L. Quarles III, William F. Lee, T. Travis Medlock,* Attorney General of South Carolina, *Kenneth P. Woodington,* Assistant Attorney General, *John C. Christie, Jr., J. William Hayton, Stephen J. Landes, Lucinda O. McConathy, J. D. Todd, Jr., Michael J. Giese, Dan M. Byrd, Jr.,* and *Mitchell K. Byrd.*

Don B. Miller argued the cause for respondent. With him on the brief were *Jean H. Toal* and *Robert M. Jones.**

JUSTICE STEVENS delivered the opinion of the Court.

At issue in this litigation is the right to possession of a "Tract of Land of Fifteen Miles square" described in a 1763 treaty between the King of England and the Catawba Head Men and Warriors.[1] The tract, comprising 144,000 acres and 225 square miles, is located near the northern border of South Carolina; some 27,000 persons now claim title to different parcels within the tract. The specific question presented to us is whether the State's statute of limitations applies to the Tribe's claim. The answer depends on an interpretation of a statute enacted by Congress in 1959 to authorize a division of Catawba tribal assets. See 25 U. S. C. §§931–938.

**Solicitor General Lee, Assistant Attorney General Habicht, Edwin S. Kneedler, Jacques B. Gelin,* and *Arthur E. Gowran* filed a brief for the United States as *amicus curiae.*

[1] The 1763 Treaty of Fort Augusta was entered into by the Catawbas and British and colonial officials, and provides, in relevant part:

"And We the Catawba Head Men and Warriors in Confirmation of an Agreement heretofore entered into with the White People declare that we will remain satisfied with the Tract of Land of Fifteen Miles square a Survey of which by our consent and at our request has been already begun and the respective Governors and Superintendant on their Parts promise and engage that the aforesaid survey shall be compleated and that the Catawbas shall not in any respect be molested by any of the King's subjects within the said Lines but shall be indulged in the usual Manner of hunting Elsewhere." XI Colonial Records of North Carolina 201–202 (1763), reprinted in App. 35.

We hold that the State's statute applies, but we do not reach the question whether it bars the Tribe's claim.

Simply stated, the Tribe[2] claims that it had undisputed ownership and possession of the land before the first Nonintercourse Act was passed by Congress in 1790;[3] that the Nonintercourse Act prohibited any conveyance of tribal land without the consent of the United States; and that the United States never gave its consent to a conveyance of this land. Accordingly, the Tribe's purported conveyance to South Carolina in 1840 is null and void. Among the defenses asserted by petitioners[4] is the contention that, even if the Tribe's claim was valid before passage and enactment of the Catawba Division of Assets Act, § 5 of the Act made the state statute of limitations applicable to the claim. Because that is the only contention that we review, it is not necessary to describe much of the historical material in the record.

I

In 1760 and 1763, the Tribe surrendered to Great Britain its aboriginal territory in what is now North and South Carolina in return for the right to settle permanently on the "Tract of Land of Fifteen Miles square" that is now at issue.

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[2] Respondent, Catawba Indian Tribe, Inc., is a nonprofit corporation organized under the laws of South Carolina in 1975. Like the District Court and the Court of Appeals, we assume that respondent is the successor in interest of the Catawba Indian Tribe of South Carolina. For convenience, we refer to respondent as the "Tribe" throughout this opinion.

[3] See Act of July 22, 1790, ch. 33, § 4, 1 Stat. 138. The Act, now codified at 25 U. S. C. § 177, states in relevant part:

> "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

[4] Petitioners include the State of South Carolina and approximately 76 other parties who are named as defendants in the complaint; they were sued as representatives of a class that was alleged to consist of the approximately 27,000 persons who claim an interest in the disputed land.

For purposes of this summary judgment motion, it is not disputed that the Tribe retained title to the land when the Nonintercourse Acts were passed.

By 1840, the Tribe had leased most, if not all, of the land described in the 1763 treaty to white settlers. In 1840, the Tribe conveyed its interest in the "Tract of Land of Fifteen Miles square" to the State of South Carolina by entering into the "Treaty of Nation Ford." In that treaty, the State agreed, in return for the "Tract," to spend $5,000 to acquire a new reservation, to pay the Tribe $2,500 in advance, and to make nine annual payments of $1,500 in the ensuing years. In 1842, the State purchased a 630-acre tract as a new reservation for the Tribe, which then apparently had a membership of about 450 persons.[5] This land is still held in trust for the Tribe by South Carolina.

The Tribe contends that the State did not perform its obligations under the treaty—it delayed the purchase of the new reservation for over 2½ years; it then spent only $2,000 instead of $5,000 to purchase the new land; and it was not actually "new" land because it was located within the original 144,000-acre tract. Still more importantly, as noted, the Tribe maintains that this entire transaction was void because the United States did not consent to the conveyance as required by the Nonintercourse Act.

At various times during the period between 1900 and 1943, leaders of the Tribe applied to the State for citizenship and for a "final settlement of all their claims against the State."[6] Petitioners argue that these claims merely sought full performance of the State's obligations under the 1840 treaty, but, for purposes of our decision, we accept the Tribe's position that it was then asserting a claim under the Nonintercourse Acts and thus challenging the treaty itself. In any event, both state officials and representatives of the Federal Government took an interest in the plight of the Tribe.[7]

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[5] An 1825 War Department chart indicated that the Catawbas totaled 450 persons. 2 American State Papers 545 (1925).

[6] See 1920 S. C. Acts 1700, Joint Res. No. 904, § 1.

In response to this concern, on December 14, 1943, the Tribe, the State, and the Office of Indian Affairs of the Department of the Interior entered into a Memorandum of Understanding which was intended to provide relief for the Tribe, but which did not require the Tribe to release its claims against the State.[8] Pursuant to that agreement, the State purchased 3,434 acres of land at a cost of $70,000 and conveyed it to the United States to be held in trust for the Tribe.[9] The Federal Government agreed to make annual contributions of available sums for the welfare of the Tribe and to assist the Tribe with education, medical benefits, and economic development. For its part, the Tribe agreed to conduct its affairs on the basis of the Federal Government's recommendations; it thereafter adopted a Constitution approved by the Secretary of the Interior pursuant to the Indian Reorganization Act, 25 U. S. C. § 476.

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[7] In 1930, a Subcommittee of the Senate Committee on Indian Affairs held hearings in Rock Hill, South Carolina, which is located in the 144,000-acre tract. Senator Thomas of Oklahoma wrote that the "subcommittee . . . found some hundred and seventy-five remnants of this band located on a tract of practically barren rock and gradually starving to death." Division of Tribal Assets of Catawba Indian Tribe, Hearings on H. R. 6128, before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 86th Cong., 1st Sess. (unpublished), Insert 5, at 3 (Minutes of State and Federal Conference, Oct. 21, 1958) (6 Record Ex. 56), quoting Feb. 10, 1932, letter, Senator Thomas to Commissioner Rhoads.

[8] Preliminary drafts of the Memorandum of Understanding contained a provision extinguishing the Tribe's reservation claim (6 Record Ex. 49), but that provision was deleted. The Solicitor of the Department of the Interior emphasized that the agreement should not use "a contract under the Johnson-O'Malley Act in order to deprive the Indian tribe of claims which it might be able to enforce in the courts." United States Department of the Interior, Office of the Solicitor, Memorandum for the Commissioner of Indian Affairs. *Id.*, Ex. 50, p. 3.

[9] The State also agreed to appropriate at least $9,500 annually for three years for the benefit of the Tribe and to extend to Catawbas the rights and privileges of all citizens, including admission to public schools. *Ibid.*

In 1953, Congress decided to make a basic change in its policies concerning Indian affairs. The passage of House Concurrent Resolution 108 on August 1, 1953,[10] marked the beginning of the "termination era"—a period that continued into the mid-1960's, in which the Federal Government endeavored to terminate its supervisory responsibilities for Indian tribes.[11] Pursuant to that policy, the Federal Government identified the Catawba Tribe as a likely candidate for the withdrawal of federal services.[12] Moreover, members of the Tribe desired an end to federal restrictions on alienation of their lands in order to facilitate financing for homes and farm operations.[13] Accordingly, after discussions with representatives of the Bureau of Indian Affairs in which leaders of the Tribe were assured that any claim they had against the State would not be jeopardized by legislation terminating federal services, the Tribe adopted a resolution supporting such legislation and authorizing a distribution of tribal assets to the members of the Tribe.[14] After receiving advice that the Tribe supported legislation authorizing the disposal of the tribal assets and terminating federal responsibility for the Tribe and its individual members, Congress enacted the Catawba Indian Tribe Division of Assets Act, 73 Stat. 592, 25 U. S. C. §§ 931–938. The Act provides for the preparation of a tribal membership roll, § 931; the tribal council's designation of sites for church, park, playground, and cemetery purposes, § 933(b); and the division of remaining assets among the enrolled members of the Tribe, § 933(f). The Act also provides for the revocation of the Tribe's Constitution and the termination of federal services for the Tribe, § 935. It explicitly states that state laws shall apply to members of the Tribe in the same manner that they apply to non-Indians. *Ibid.* Pursuant to that Act, the 3,434-acre reservation that had been acquired as a result of the 1943 Memorandum of Understanding was distributed to the members of the Tribe; the Secretary of the Interior revoked the Tribe's Constitution, effective July 1, 1962.

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[10] That Resolution declared: "[I]t is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship." H. R. Con. Res. 108, 83d Cong., 1st Sess. (1953), 67 Stat. B132.

[11] According to one compilation, between 1954 and 1962, Congress passed 12 separate "Termination Acts," the 11th of which was the Catawba Act. See F. Prucha, The Great Father 1048 (1984). The termination policy has been criticized by various commentators. See, *e. g.*, Cornell, The New Indian Politics, 10 Wilson Q. 113, 121 (1986); F. Prucha, *supra*, at 1046–1059; Wilkinson & Biggs, The Evolution of the Termination Policy, 5 American Indian L. Rev. 139 (1977); Preloznik & Felsenthal, The Menominee Struggle to Maintain Their Tribal Assets and Protect Their Treaty Rights Following Termination, 51 N. D. L. Rev. 53 (1975). The ultimate legislative wisdom of the termination policy is, of course, not before the Court.

[12] In September 1954, a House Study Subcommittee on Indian Affairs reported that the Catawba Tribe was one of the groups able to take responsibility for their affairs and therefore was ready for termination of federal services. H. R. Rep. No. 2680, 83d Cong., 2d Sess., 2–3 (1954). In contrast to the report made by Senator Thomas in 1930, n. 7, *supra*, the Reports accompanying the Act concluded that the Catawbas had been able to merge into the general community and had been able to attain an economic position comparable to that of non-Indians. See S. Rep. No. 863, 86th Cong., 1st Sess., 3 (1959) ("The Catawba Indians have advanced economically . . . during the past 14 years, and have now reached a position that is comparable to their non-Indian neighbors"); H. R. Rep. No. 910, 86th Cong., 1st Sess., 2 (1959) (same). Most adult male Catawbas were

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employed at the time: 47% were in industry, 20% in skilled labor, 7% in the Armed Services, 15% in odd jobs, 5% retired, and 6% on the welfare rolls. S. Rep., at 4; H. R. Rep., at 5.

[13] See 105 Cong. Rec. 5462 (1959) (statement of Rep. Hemphill); App. 102.

[14] The resolution adopted at the meeting of the Tribe on January 3, 1959, expressly noted that "nothing in this legislation shall affect the status of any claim against the State of South Carolina by the Catawba Tribe." *Id.*, at 103.

In 1980, the Tribe commenced this action seeking possession of the 225-square-mile tract and trespass damages for the period of its dispossession. All of the District Judges for the District of South Carolina recused themselves, and Judge Willson of the Western District of Pennsylvania was designated to try the case. After the development of a substantial record of uncontested facts, Judge Willson granted petitioners' motion for summary judgment. His order of dismissal was initially reversed by a panel of the Court of Appeals for the Fourth Circuit, 718 F. 2d 1291 (1983); sitting en banc, the full Court of Appeals adopted the panel's opinion. 740 F. 2d 305 (1984). Because of the importance of the case, we requested the views of the Solicitor General of the United States and granted certiorari, 471 U. S. 1134 (1985). We now reverse.

II

Section 5 of the Catawba Act is central to this dispute. As currently codified, it provides:

> "The constitution of the tribe adopted pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title shall be revoked by the Secretary. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction. Nothing in this subchapter, however, shall affect the status of such persons as citizens of the United States." 25 U. S. C. § 935.

This provision establishes two principles in unmistakably clear language. First, the special federal services and statutory protections for Indians are no longer applicable to the

Catawba Tribe and its members. Second, state laws apply to the Catawba Tribe and its members in precisely the same fashion that they apply to others.

The Court of Appeals disagreed with this reading of the Act. For it concluded that the word "them" in the second sentence of § 5 could refer to the individual Indians who are members of the Tribe and not encompass the Tribe itself. Relying on the canon that doubtful expressions of legislative intent must be resolved in favor of the Indians,[15] it thus held that the language in § 5 about the inapplicability of federal Indian statutes and the applicability of state laws did not reach the Tribe itself.

The canon of construction regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress.[16] It seems clear to us that the antecedent of the words "them" and "their" in the second sentence of § 5 is the compound subject of the first clause in the sentence, namely, "the tribe and its members." To read the provision otherwise is to give it a contorted construction that abruptly divorces the first clause from the second and the third, and that conflicts with the central purpose and philosophy of the Termination Act. According the statutory language its ordinary meaning, moreover, is reinforced by the fact that the first sentence in the section provides for a revocation of the Tribe's Constitution. It would be most incongruous to preserve special protections for a tribe whose constitution has been revoked while withdrawing protection for individual members of that tribe.[17]

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[15] *DeCoteau* v. *District County Court*, 420 U. S. 425, 444 (1975); *Antoine* v. *Washington*, 420 U. S. 194, 199–200 (1975); *Mattz* v. *Arnett*, 412 U. S. 481, 504–505 (1973).

[16] See *Oregon Dept. of Fish and Wildlife* v. *Klamath Indian Tribe*, 473 U. S. 753, 774 (1985) ("[E]ven though 'legal ambiguities are resolved to the benefit of the Indians,' *DeCoteau* v. *District County Court*, 420 U. S. 425, 447 (1975), courts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' *Washington* v. *Washington Commercial Passenger Fishing Vessel Assn.*, 443 U. S. [658, 673 (1979)], clearly runs counter to a tribe's later claims"); *Rice* v. *Rehner*, 463 U. S. 713, 732 (1983) (canon of construction regarding certain Indian claims should not be applied "when application would be tantamount to a formalistic disregard of congressional intent"); *Andrus* v. *Glover Construction Co.*, 446 U. S. 608, 618–619 (1980); *DeCoteau* v. *District County Court*, 420 U. S., at 447 ("A canon of construction is not a license to disregard clear expressions of tribal and congressional intent").

Without special federal protection for the Tribe, the state statute of limitations should apply to its claim in this case. For it is well established that federal claims are subject to state statutes of limitations unless there is a federal statute of limitations or a conflict with federal policy.[18] Although federal policy may preclude the ordinary applicability of a state statute of limitations for this type of action in the absence of a specific congressional enactment to the contrary, *County of Oneida* v. *Oneida Indian Nation*, 470 U. S. 226 (1985), the Catawba Act clearly suffices to reestablish the usual principle regarding the applicability of the state statute of limitations. In striking contrast to the situation in

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[17] Respondent argues that the scope of the Act was merely to terminate the specific federal services arising from the 1943 Memorandum of Understanding. Such a limited interpretation cannot be reconciled with the broader language of the Act ("The tribe and its members shall not be entitled to *any* of the special services performed by the United States for Indians because of their status as Indians"; "*all* statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them"; "the laws of the several states shall apply to them *in the same manner* they apply to other persons or citizens within their jurisdiction") (emphasis added).

[18] See, *e. g.*, *Wilson* v. *Garcia*, 471 U. S. 261, 266–267 (1985); *Board of Regents* v. *Tomanio*, 446 U. S. 478, 483–484 (1980); *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 462 (1975); *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U. S. 696, 703–704 (1966); *Cope* v. *Anderson*, 331 U. S. 461, 463 (1947); *Rawlings* v. *Ray*, 312 U. S. 96, 97 (1941); *O'Sullivan* v. *Felix*, 233 U. S. 318, 322–323 (1914); *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 203 U. S. 390, 397–398 (1906); *McClaine* v. *Rankin*, 197 U. S. 154, 158 (1905); *Campbell* v. *Haverhill*, 155 U. S. 610, 617 (1895); *McCluny* v. *Silliman*, 3 Pet. 270, 277 (1830).

County of Oneida, the Catawba Act represents an explicit redefinition of the relationship between the Federal Government and the Catawbas; an intentional termination of the special federal protection for the Tribe and its members; and a plain statement that state law applies to the Catawbas as to all "other persons or citizens."

That the state statute of limitations applies as a consequence of terminating special federal protections is also supported by the significance we have accorded congressional action redefining the federal relationship with particular Indians. We have long recognized that, when Congress removes restraints on alienation by Indians, state laws are fully applicable to subsequent claims.[19] Similarly, we have emphasized that Termination Acts subject members of the terminated tribe to "the full sweep of state laws and state taxation."[20] These principles reflect an understanding that congressional action to remove restraints on alienation and other federal protections represents a fundamental change in federal policy with respect to the Indians who are the subject of the particular legislation.

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[19] See, *e. g.*, *Larkin* v. *Paugh*, 276 U. S. 431, 439 (1928) ("With the issue of the patent, the title not only passed from the United States but the prior trust and the incidental restrictions against alienation were terminated. This put an end to the authority theretofore possessed by the Secretary of the Interior by reason of the trust and restriction—so that thereafter all questions pertaining to the title were subject to examination and determination by the courts, appropriately those in Nebraska, the land being there"); *Dickson* v. *Luck Land Co.*, 242 U. S. 371, 375 (1917) ("With those restrictions [of Congress] entirely removed and the fee simple issued it would seem that the situation was one in which all questions pertaining to the disposal of the lands naturally would fall within the scope and operation of the laws of the State"); *United States* v. *Waller*, 243 U. S. 452, 461–462 (1917) ("We cannot escape the conviction that the plain language of this act evidences the intent and purpose of Congress to make such lands allotted to mixed-blood Indians subject to alienation with all the incidents and rights which inhere in full ownership in persons of full capacity"); *Schrimpscher* v. *Stockton*, 183 U. S. 290, 296 (1902) (after a treaty removed restraints from alienation of land by certain Wyandotte Indians, state statute of limitations ran against Indians, even though Indians later asserted claim of a prior federal treaty violation; after removal of restraints on alienation, the Indian's heirs "were chargeable with the same diligence in beginning an action for their recovery as other persons having title to lands").

The Court of Appeals found support for its conclusion about the nonapplicability of the state statute of limitations in § 6 of the Catawba Act, which provides that nothing in the statute affects the rights of the Tribe under the laws of South Carolina.[21] The thrust of the Court of Appeals' reasoning was that, if a state law was inapplicable to the Tribe or its members before the effective date of the Act, its application after the effective date necessarily violates § 6. But such a reading contradicts the plain meaning of § 5's reference to the applicability of state laws. In our view § 6 was merely intended to remove federal obstacles to the ordinary application of state law. Section 6 cannot be read to preserve, of its own force, a federal tribal immunity from otherwise applicable state law without defeating a basic purpose of the Act and negating explicit language in § 5.[22] Most fundamentally, § 6 simply does not speak to the explicit redefinition of the federal relationship with the Catawbas that is the basis for the applicability of the state statute of limitations.

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[20] *Bryan* v. *Itasca County*, 426 U. S. 373, 389 (1976). See also *United States* v. *Antelope*, 430 U. S. 641, 647, n. 7 (1977) ("[M]embers of tribes whose official status has been terminated by congressional enactment are no longer subject, by virtue of their status, to federal criminal jurisdiction under the Major Crimes Act"); *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128 (1972) (terminated members of Tribe must bring action to invalidate allegedly fraudulent conveyance under same laws as other citizens).

As the Court of Appeals noted, in *Menominee Tribe* v. *United States*, 391 U. S. 404 (1968), the Court concluded that the Menominee Termination Act did not terminate the Tribe's hunting and fishing rights. The Court emphasized that the Termination Act must be read *in pari materia* with an Act passed in the same Congress that preserved hunting and fishing rights. *Id.*, at 411. In this case, of course, there is no similar contemporaneous statute. Moreover, in *Menominee*, the Court was concerned about a "backhanded" abrogation of treaty rights, *id.*, at 412; no comparable abrogation is at issue here.

[21] As currently codified, § 6 provides:

"Nothing in this subchapter shall affect the rights, privileges, or obligations of the tribe and its members under the laws of South Carolina." 25 U. S. C. § 936.

Finally, the Court of Appeals relied heavily on the assurance to the Tribe that the status of any claim against South Carolina would not be affected by the legislation.[23] Even assuming that the legislative provisions are sufficiently ambiguous to warrant reliance on the legislative history, we believe that the Court of Appeals misconceived the import of this assurance. We do not accept petitioners' argument that the Catawba Act immediately extinguished any claim that the Tribe had before the statute became effective. Rather, we assume that the status of the claim remained exactly the same immediately before and immediately after the effective date of the Act, but that the Tribe thereafter had an obligation to proceed to assert its claim in a timely manner as would any other person or citizen within the State's jurisdiction. As a result, unlike the Court of Appeals, we perceive no contradiction between the applicability of the state statute of limitations and the assurance that the status of any state claims would not be affected by the Act.

We thus conclude that the explicit redefinition of the federal relationship reflected in the clear language of the Catawba Act requires the application of the state statute of limitations to the Tribe's claim.

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[22] It is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Colautti* v. *Franklin*, 439 U. S. 379, 392 (1979). See also *Mountain States Tel. & Tel. Co.* v. *Pueblo of Santa Ana*, 472 U. S. 237, 249 (1985); *United States* v. *Menasche*, 348 U. S. 528, 538–539 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute,' *Montclair* v. *Ramsdell*, 107 U. S. 147, 152, rather than to emasculate an entire section").

[23] See 718 F. 2d 1291, 1296 (1983) (quoting Bureau of Indian Affairs official's assurance that "'any claim the Catawbas had against the State would not be jeopardized by carrying out a program with the Federal Government'").

III

The District Court held that respondent's claim is barred by the South Carolina statute of limitations. The Court of Appeals' construction of the 1959 federal statute made it unnecessary for that court to review the District Court's interpretation of state law. Because the Court of Appeals is in a better position to evaluate such an issue of state law than we are,[24] we remand the case to that court for consideration of this issue.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL and JUSTICE O'CONNOR join, dissenting.

The Catawba Indian Tribe Division of Assets Act, 73 Stat. 592, 25 U. S. C. § 931 *et seq.*, was passed by Congress in 1959 to divide up the Tribe's federally supervised reservation so that individual Catawbas could sell or mortgage their allotments. The Court today concludes that the Act also had the incidental effect of applying a South Carolina statute of limitations to the Catawbas' pre-existing and longstanding claim to lands the State purported to purchase from the Tribe in 1840. I feel this interpretation cannot be reconciled with the language of the Act under this Court's traditional approach to statutes regulating Indian affairs. I therefore dissent.

I

Too often we neglect the past. Even more than other domains of law, "the intricacies and peculiarities of Indian law deman[d] an appreciation of history." Frankfurter,

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[24] See *Pembaur* v. *Cincinnati*, 475 U. S. 469, 484–485, n. 13 (1986); *Regents of University of Michigan* v. *Ewing*, 474 U. S. 214, 224, n. 10 (1985); *Bishop* v. *Wood*, 426 U. S. 341, 345–347 (1976); *Propper* v. *Clark*, 337 U. S. 472, 486–487 (1949).

Foreword to A Jurisprudential Symposium in Memory of Felix S. Cohen, 9 Rutgers L. Rev. 355, 356 (1954).

Before the arrival of white settlers, the Catawba Indians occupied much of what is now North and South Carolina. In the 1760 Treaty of Pine Tree Hill, the Catawbas relinquished the bulk of their aboriginal territory to Great Britain in exchange for assurances that they would be allowed to live in peace on a small portion of that territory, a square of land 15 miles on each side (144,000 acres), which today surrounds and includes Rock Hill, S. C. Three years later, in the Treaty of Augusta, the Tribe again agreed to "remain satisfied with the Tract of Land of Fifteen Miles square," and the British once more promised that "the Catawba shall not in any respect be molested by any of the King's subjects within the said Lines." App. 35. It is the 144,000 acres reserved for the Catawbas in 1760 and again in 1763—"a mere token of the[ir] once large domain"—that give rise to this litigation. See J. Brown, The Catawba Indians 8 (1966) (Brown).

The historical record suggests that the Catawbas were driven to the agreements of 1760 and 1763 in large part by the colonists' repeated and continuing encroachments on tribal lands.[1] Some of the land was acquired by purchase, see, *e. g.*, *id.*, at 165, but in South Carolina, as elsewhere, "[f]rom the very beginning abuses marred the transfer of land titles from the Indians to individuals among the English colonists." F. Prucha, American Indian Policy in the Formative Years 6 (1962). Indeed, the South Carolina Provincial Council took legislative notice in a 1739 statute that lands purchased from Indians were "generally obtained . . . by unfair representations, fraud and circumvention, or by making them gifts or presents of little value, by which practices, great resentments and animosities have been created amongst the Indians toward the inhabitants of this Province." An Act to restrain and prevent the purchasing Lands from Indians, 1 The First Laws of the State of South Carolina 160–161 (J. Cushing ed. 1981). The 1739 statute therefore barred the private acquisition of Indian lands without a grant or license from the Crown or the Governor, but such steps apparently did little to stop white encroachments on Indian territory. See Clinton & Hotopp, Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 U. Maine L. Rev. 17, 21 (1979). Recognizing that "great frauds and abuses have been committed in the purchasing lands of the Indians," the Crown in October 1763—shortly before the signing of the Treaty of Augusta—flatly forbade any further private purchases of land reserved for Indian tribes. Proclamation of 1763, reprinted in 3 W. Washburn, The American Indian and the United States 2135, 2138 (1973).

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[1] In letters written in 1754 to the Catawbas and to the President of the Council of North Carolina, Governor Glen of South Carolina noted that the Catawbas repeatedly had complained about whites' settling too close to them. 6 Record, Exs. 1 and 2. In response to these complaints, Governor Glen forbade whites to settle within 30 miles of Catawba towns, *ibid.*, but that prohibition was frequently ignored. See C. Hudson, The Catawba Nation 49 (1970). For general discussions of early colonial encroachments on Catawba land, see Brown, at 163–166; P. Dammann, D. Miller, & D. Israel, A History of the Catawba Tribe and its Reservation Lands, reprinted in Settlement of the Catawba Indian Land Claims, Hearing before the House Committee on Interior and Insular Affairs on H. R. 3274, 96th Cong., 1st Sess., 135, 151–153 (1979) (Hearing).

The United States from an early date followed a similar policy. Since 1790, the Nonintercourse Act, now codified as reenacted and amended at 25 U. S. C. § 177, has broadly prohibited the sale of Indian land without the consent of the Federal Government. Despite this prohibition—which in 1793 was extended to include not only outright purchases but also acquisitions of any "claim" to protected lands, see Act of Mar. 1, 1793, § 8, 1 Stat. 330—mounting pressures from settlers in the early 19th century led the State of South Carolina to enact a series of statutes purporting to authorize the leasing of Catawba lands to non-Indians. Initially, the leases signed under these statutes seem to have posed little threat to the Tribe. According to B. S. Massey, who knew the Catawbas during this time and later served as South Carolina's agent to the Tribe, "[t]hey were then strong and felt themselves in their own greatness, governed by their own laws, working the best spots of their lands and leasing out the poorer portions to the white men." Report to The Governor of South Carolina on the Catawba Indians 4 (1854), reprinted in 6 Record, Ex. 11.

By the 1830's, however, nearly all of the 144,000 acres reserved for the Tribe in the Treaty of Augusta had been leased to non-Indians. This situation proved disastrous, because rents were "generally paid in old horses, old cows or bed quilts and clothes, at prices that the whites set on the articles taken." *Ibid.* The Catawbas soon were reduced to "a state of starvation and distress," *ibid.*, and they ultimately gave in to repeated efforts by the State to purchase their land. In 1840, representatives of the Tribe and the State signed the Treaty of Nation Ford. Under this "treaty"—which the United States never joined or approved—the Catawbas relinquished all their land in exchange for two promises. First, the State promised the sum of $16,000 in a series of resettlement payments. Second, the State pledged that it would purchase a new reservation "of the value of five thousand dollars," including 300 acres of "good arable lands fit for cultivation" in a thinly populated area of North or South Carolina satisfactory to the Indians. App. 38–39.[2]

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[2] According to Massey, the Indians "were driven to" this agreement "by being surrounded by white men, [who] cheat[ed] them out of their rights, and [by] partaking of the vices of the whites and but few of their virtues." Report to The Governor of South Carolina on the Catawba Indians 5 (1854), reprinted in 6 Record, Ex. 11. The "vices" to which Massey referred may have included the consumption of alcohol; the Catawbas later charged that state representatives negotiated the treaty by setting out a whiskey barrel and tin cups and inviting the Indians to help themselves. This charge was reported to the Department of the Interior in a 1908

The South Carolina Legislature promptly provided for the transfer of title from the State to the lessees of the 144,000 acres, requiring only that the lessees reimburse the State proportionately for its advances to the Tribe. Act of Dec. 18, 1840, § 3, 7 S. C. Stats. 103 (1840). Unfortunately, the State showed less enthusiasm in fulfilling its contractual obligations to the Indians. After allowing the Catawbas to wander homeless and uncompensated for 2½ years, the State reportedly spent $2,000 to buy back 630 agriculturally undesirable acres of the Catawbas' original 18th-century treaty lands as a "new" reservation for the Tribe.[3] The State continues to hold these 630 acres for the Catawbas. It is unclear from the record before us whether the Tribe ever received the resettlement payments promised by the State.

In the 146 years that have passed since the Nation Ford agreement, the Catawbas repeatedly have pressed their claim to the 144,000 acres, which they feel were taken from them illegally. In the early 1900's, the Tribe petitioned both the Federal Government and the State of South Carolina for relief, arguing that the 1840 transfer was void because the United States had not approved it. The Commissioner of Indian Affairs advised the Catawbas in 1906 and again in 1909 that the Department of the Interior would not seek relief on their behalf. He explained that the Catawbas were "state Indians" for whom the United States had no responsibility, and, consequently, that the absence of federal participation in

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memorandum by Catawba tribal attorney Chester Howe. See Plaintiffs' Response to Defendants' Motion to Dismiss in No. 80–2050–6 (CA4) p. 23, n. 30, citing Record Group 75, National Archives Central Files 1907–1939, BIA File No. 1753–1906.

[3] See Brown, at 317, 320–322. Assuming this account is correct, the new reservation was less than one-half of one percent of the Tribe's 1763 treaty lands. The price paid by the State for the new reservation—which works out to roughly $3.17 per acre—contrasts strikingly with the price paid for the same land when purchased from the Indians 2½ years earlier—the approximate equivalent of 15 cents per acre payable in installments over 10 years.

the Treaty of Nation Ford did not void the transaction.[4] In 1908, the South Carolina Attorney General reached the same conclusion, and advised the state legislature that the Tribe had no outstanding claim to any of the 144,000 acres. 1908 Op. S. C. Atty. Gen. 17, 18, 29–32. The Tribe nonetheless continued to press its claim to the land. A federal Indian agent visiting the Catawbas in December 1910, for example, was asked about the Tribe's prospects for recovering "their old reservation of 15 miles square"; he told them the Department of the Interior would not take their case into court. 6 Record, Ex. 21, pp. 11–12 (letter from C. Davis to Comm'r of Indian Affairs, Jan. 5, 1911).

The seeds of the legislation found dispositive by the Court today were planted in 1943, when the Tribe, the State of South Carolina, and the Department of the Interior concluded a Memorandum of Understanding providing for a new reservation for the Catawbas, and placing the Tribe and the new reservation under federal supervision. Evidently concerned about the Tribe's continued grievances concerning the 1840 agreement, South Carolina sought, unsuccessfully, to include in the Memorandum a waiver of any outstanding claims the Catawbas had against the State. *Id.*, Ex. 48 (letter from Ass't Comm'r of Indian Affairs to S. C. State Auditor, Aug. 28, 1941). Preliminary drafts of the Memorandum included such a waiver, see *id.*, Ex. 49, p. 5, but federal officials ultimately dropped the provision because they doubted the legality of using the agreement to deprive the Indians of claims that otherwise might be enforceable in court, see App.

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[4] 6 Record, Exs. 18, 20. But see *United States* v. *Candelaria*, 271 U. S. 432, 442 (1926) (construing the term "Indian Tribe" in the Nonintercourse Act to refer to any "'body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory,'" quoting *Montoya* v. *United States*, 180 U. S. 261, 266 (1901); *Joint Tribal Council of Passamaquoddy Tribe* v. *Morton*, 528 F. 2d 370, 376–378 (CA1 1975) (applying Nonintercourse Act to Tribe lacking federal recognition).

43–44 (memorandum from Interior Dept. Solicitor to Comm'r of Indian Affairs, Jan. 13, 1942).

In 1958, after representatives from the Bureau of Indian Affairs suggested to the Catawbas that their financial difficulties could be alleviated by distributing the Tribe's federally supervised assets and ending federal restrictions on alienation, the Indians expressed concern about their claims against the State, but they were assured that the proposal would not jeopardize those claims. 6 Record, Ex. 53, pp. 7–8 (memorandum from program officer to Tribal Programs Branch Chief, Jan. 30, 1959) (quoted by the Court, *ante*, at 510, n. 23). The Tribe then adopted a resolution calling on its Congressman, Robert Hemphill, to introduce and secure passage of legislation to remove restraints on alienation and to distribute tribal assets; the resolution specifically requested, however, that "nothing in this legislation shall affect the status of any claim against the State of South Carolina by the Catawba Tribe." App. 103.

Representative Hemphill asked the Bureau of Indian Affairs to draft legislation "to accomplish the desires set forth in the Resolution." *Id.*, at 50. He then presented the draft bill to the Catawbas and told them that it had been "drawn up to carry out the intent of the resolution." *Id.*, at 111. After a majority of the Tribe expressed approval, Representative Hemphill introduced the bill in Congress, explaining that the Tribe had given its consent. See 105 Cong. Rec. 5462 (1959). The result was the 1959 Division of Assets Act, which the Court today concludes may bar the Tribe from pursuing its claim to the lands reserved for it in 1760 and 1763.

In the 1970's, spurred by favorable legal rulings elsewhere in the country, Catawba leaders renewed their request to the Department of the Interior to seek relief for the Tribe. In 1977, the Solicitor of the Department concluded that the rebuffs given the Catawbas in 1906 and 1909 had been legally unjustified, and that the Tribe could establish a prima facie claim to the 144,000 acres. He further concluded that the

Division of Assets Act operated prospectively only, and did not affect pre-existing rights. Accordingly, the Solicitor formally requested the Department of Justice to institute legal action on behalf of the Catawbas and to support the settlement discussions that the Tribe already had initiated with South Carolina officials. See App. to Brief in Opposition 3a. The litigation request was later withdrawn in an effort to emphasize that the Interior Department favored a negotiated settlement if at all possible, and settlement legislation backed by the Tribe was introduced in Congress. See Hearing, at 15–17 (statement of Leo M. Krulitz, Solicitor of the Department of the Interior). The legislative efforts apparently proved fruitless, and in October 1980 the Tribe filed this suit.

II

The Tribe's complaint asserts a right to possession of the reserved portion of its aboriginal territory under the Nonintercourse Act, the Federal Constitution, and the treaties of 1760 and 1763.[5] These are federal claims, see *Oneida Indian Nation* v. *County of Oneida*, 414 U. S. 661, 666–678 (1974) *(Oneida I)*, and the statute of limitations is thus a matter of federal law, see *County of Oneida* v. *Oneida Indian Nation*, 470 U. S. 226, 240–244 (1985) *(Oneida II)*. Where, as here, Congress has not specified a statute of limitations, federal courts generally borrow the most closely analogous limitations period under state law, but *only* if application of the state limitations period would not frustrate federal policy. See, *e. g., Wilson* v. *Garcia*, 471 U. S. 261, 266–267 (1985); *DelCostello* v. *Teamsters*, 462 U. S. 151, 158–163

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[5] Although the complaint asks in part that the Tribe "be restored to immediate possession" of virtually the entire 144,000 acres, App. 25, the available remedies, even if the Tribe prevailed, well might be limited by equitable considerations. See *Yankton Sioux Tribe* v. *United States*, 272 U. S. 351, 357 (1926). The question currently before the Court, of course, is not whether part or all of the land claimed by the Catawbas should be given back to them, but whether the Tribe's ability to seek any judicial relief at all is governed by South Carolina's statute of limitations.

(1983); *Occidental Life Ins. Co.* v. *EEOC,* 432 U. S. 355, 367 (1977).

In *Oneida II*, the Court recognized that application of state statutes of limitations to Indian land claims generally *would* violate federal policy. The Court noted that a 1950 federal statute giving New York courts jurisdiction over most civil disputes involving Indians had been carefully crafted to exempt pre-existing land claims from the operation of a New York statute of limitations. See Act of Sept. 13, 1950, 64 Stat. 845, 25 U. S. C. §233. Furthermore, in a later series of more general enactments imposing a federal statute of limitations on certain tort and contract actions brought anywhere in the United States by Indians or by the United States on behalf of Indians, Congress specifically excluded from the limitations period all actions "to establish the title to, or right of possession of, real or personal property." 28 U. S. C. §2415(c).[6] The Court in *Oneida II* concluded that the text and legislative history of these statutes evinced a congressional belief that actions brought to enforce Indian property rights were not, and should not be, subject to filing deadlines other than those provided by federal statute. Borrowing a state statute of limitations in such a case "would be a violation of Congress' will." 470 U. S., at 244.

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[6] The federal statute of limitations for certain tort and contract actions brought by the United States on behalf of Indian Tribes was first adopted in 1966; the limitations period was not applied to suits brought by Indians themselves until 1982. "In 1972 and again in 1977, 1980, and 1982, as the statute of limitations was about to expire for pre-1966 claims, Congress extended the time within which the United States could bring suits on behalf of the Indians." *Oneida II,* 470 U. S., at 242. The debates over these amendments to §2415 indicate that Congress extended the filing deadline in part to allow additional time for preparation and negotiation of tort claims for trespass damages arising from allegedly illegal expropriations of tribal lands—including the 144,000 acres claimed by the Catawbas. See, *e. g.*, 123 Cong. Rec. 22166–22167 (1977) (Rep. Cohen, discussing Catawba claim and others); *id.*, at 22168 (Rep. Walsh); *id.*, at 22170 (Rep. Hanley); 126 Cong. Rec. 5748–5749 (1980) (Rep. Holland, discussing Catawba claim); *id.*, at 5750 (Rep. Udall). Members of Congress emphasized repeatedly that Indian land claims were difficult to research, that Indians historically had lacked adequate legal assistance and administrative resources, and that the United States had not played its proper role in bringing suits on the Indians' behalf. See, *e. g.*, 123 Cong. Rec. 22170 (1977) (Rep. Collins); *id.*, at 22171 (Rep. Johnson); 126 Cong. Rec. 3289 (1980) (Sen. Cranston); *id.*, at 5745–5746 (Rep. Clausen); *id.*, at 5747 (Rep. Danielson); *id.*, at 5750 (Rep. Swift). See also 123 Cong. Rec. 22171 (1977) (Rep. Weiss) ("[A]s a

In determining whether the 1959 Division of Assets Act exempts the Catawbas' claim from this general principle, analysis must begin with the firmly established rule—which the Court today implicitly reaffirms, see *ante*, at 506—that ambiguities in statutes regulating Indian affairs are to be construed in the Indians' favor. See, *e. g.*, *Oneida II*, 470 U. S., at 247–248; *Bryan* v. *Itasca County*, 426 U. S. 373, 392 (1976); *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U. S. 649, 655, n. 7 (1976); *DeCoteau* v. *District County Court*, 420 U. S. 425, 444 (1975); *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 353–354 (1941); *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78, 89 (1918); *Choate* v. *Trapp*, 224 U. S. 665, 675 (1912); see generally F. Cohen, Handbook of Federal Indian Law 221–225 (1982). This rule is not simply a method of breaking ties; it reflects an altogether proper reluctance by the judiciary to assume that Congress has chosen further to disadvantage a people whom our Nation long ago reduced to a state of dependency. The rule is particularly appropriate when the statute in question was passed primarily for the benefit of the Indians, as was the 1959 Division of Assets Act. Absent "clear and plain" language to the contrary, *Santa Fe Pacific*, 314 U. S., at 353, it must be assumed that Congress did not intend to belie its

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result of the numerous injustices suffered by American Indians during the last 150 years—many at the hands of the American Government—it is incumbent on the United States to give these people—our country's first inhabitants—a full chance to redress their grievances"); 126 Cong. Rec. 3287 (1980) (Sen. Melcher) (failure to extend statute of limitations could lead to "mass injustices"). Similar considerations presumably motivated Congress' decision to exempt entirely all claims for title or possession from the limitations period prescribed in § 2415.

"avowed solicitude" for the Indians, *id.*, at 354, with a "backhanded" abrogation or limitation of their rights, *Menominee Tribe* v. *United States*, 391 U. S. 404, 412 (1968).

The Court today evidently finds in § 5 of the Division of Assets Act "the clearly expressed intent of Congress," *ante*, at 506, that the Catawbas' tribal land claim was to be subject to South Carolina's statute of limitations. The Court relies largely on two provisions of § 5. The first renders inapplicable to the Catawbas all "special services performed by the United States for Indians because of their status as Indians," and "all statutes of the United States that affect Indians because of their status as Indians." The second provides that state laws shall "apply to [the Catawbas] in the same manner they apply to other persons or citizens." 25 U. S. C. § 935. Neither of these provisions, in my view, is able to bear the weight the Court places upon it.

A

The first provision merely renders federal Indian "services" and "statutes" inapplicable to the Catawbas. I agree with the Court that this provision makes the Nonintercourse Act, along with other Indian statutes, inapplicable both to individual Catawbas and to the Tribe. See *ante*, at 505–509. But that simply means that after the Division of Assets Act went into effect, the Tribe no longer was statutorily barred from selling or leasing its land. The services-and-statutes clause of the Act does not expressly abrogate or place procedural conditions on any *pre-existing* claims the Catawbas may have had, and the broad federal policy against application of state statutes of limitations to Indian land claims is neither a "service" nor a "statute."

The majority nonetheless asserts that this Court has "long recognized that, when Congress removes restraints on alienation by Indians, state laws are fully applicable to subsequent claims." *Ante*, at 508. The cases it cites for that proposition all were decided well before the emergence during the past 35 years of a clear congressional policy against the application of state statutes of limitations to Indian land claims. See *Oneida II*, 470 U. S., at 240–244. More importantly, all the cases cited by the majority involve lands for which patents had been issued to individual Indians, not lands alleged to remain tribal property. This Court made clear in *Oneida I* that claims arising under such patents are not federal claims at all, because, "[o]nce patent issues, the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts." 414 U. S., at 676. In this case, however, as in *Oneida I*, "the assertion of a federal controversy does not rest solely on the claim of a right to possession derived from a federal grant of title whose scope will be governed by state law. Rather, it rests on the substantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory right to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession." *Id.*, at 677. Here, as in *Oneida I*, the complaint thus "asserts a present right to possession under federal law." *Id.*, at 675.

I do not see how a statute removing restraints on alienation can fairly be said to signal unambiguously a congressional intent to subject pre-existing tribal land claims arising under federal law to state statutes of limitations. But even if I agreed with the majority that the removal of restraints on alienation should trigger the application of state limitations periods, the 1959 Act lifted only *statutory* restrictions on the alienation of Catawba land, and the requirement that the Federal Government approve any transfer of the property at issue in this case did not, and does not, stem solely from any federal statute. The land set aside for the Catawbas in 1760 and 1763 was within the Tribe's aboriginal territory,[7] and their claim to the land thus derives from original title[8] as well as from the 18th-century treaties.[9] With respect to original title, at least, the Nonintercourse Act merely "'put in statutory form what was or came to be the accepted rule—that the extinguishment of Indian title required the consent of the United States.'" *Oneida II*, 470 U. S., at 240, quoting *Oneida I*, 414 U. S., at 678.[10]

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[7] John Stuart, the King's Superintendent of Indian Affairs, who had negotiated the Treaty of Augusta, noted in a 1772 letter to the South Carolina Governor that the 144,000 acres reserved for the Catawbas in that treaty

There is nothing in the 1959 legislation that indicates that Congress intended to exempt the Catawbas from this

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were, "as well as a very considerable Extent of Country besides[,] possessed by them when the Subjects of England first Settled in this part of the World." 6 Record, Ex. 7, p. 1.

[8] See generally F. Cohen, Handbook of Federal Indian Law 486–493 (1982); Cohen, Original Indian Title, 32 Minn. L. Rev. 28 (1947); Note, Indian Title: The Rights of American Natives in Lands They Have Occupied Since Time Immemorial, 75 Colum. L. Rev. 655 (1975).

[9] This Court long has respected grants of land to Indian tribes by prior governments. See, *e. g., United States* v. *Title Insurance & Trust Co.*, 265 U. S. 472, 484 (1924), quoting *Barker* v. *Harvey*, 181 U. S. 481, 491–492 (1901) ("'There is an essential difference between the power of the United States over lands to which it has had full title, and of which it has given to an Indian tribe a temporary occupancy, and that over lands which were subjected by the action of some prior government to a right of permanent occupancy, for in the latter case the right, which is one of private property, antecedes and is superior to the title of this government, and limits necessarily its powers of disposal'"); *Mitchel* v. *United States*, 9 Pet. 711 (1835).

[10] The federal common-law rule against alienation of aboriginal title without the consent of the sovereign was recognized as early as 1823 in Chief Justice Marshall's opinion for the Court in *Johnson* v. *McIntosh*, 8 Wheat. 543, 573–574 (1823), and it is reflected in the Constitution's Indian Commerce Clause, Art. I, § 8, cl. 3, which made "Indian relations . . . the exclusive province of federal law," *Oneida II*, 470 U. S., at 234, and n. 4. See Clinton & Hotopp, Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 U. Maine L. Rev. 17, 28–29 (1979). In *Oneida II*, the Court rejected a suggestion that Indian common-law rights to tribal lands were somehow swallowed up or pre-empted by the Nonintercourse Act; it made clear that the common law still furnishes an independent basis for legal relief. See 470 U. S., at 236–240.

common-law protection of undistributed tribal property as well as from its statutory codification. Nor is there anything to indicate that Congress meant to abrogate the protection promised to the Tribe under the treaties of 1760 and 1763, which the Tribe claims provide an independent source of continuing federal protection. Indeed, in rejecting an argument that a similar provision of the Menominee Termination Act destroyed treaty rights to hunt and fish, this Court noted: "The use of the word 'statutes' is potent evidence that no *treaty* was in mind." *Menominee Tribe,* 391 U. S., at 412 (emphasis in original). In the same way, Congress' use in 1959 of the terms "services" and "statutes" suggests, if anything, that the Division of Assets Act was not intended to remove other sources of protection. Surely the selection of these terms provides no support for the view that Congress meant to impose new procedural requirements on preexisting tribal land claims based not only on statutory provisions, but also on treaty rights and federal common law.[11]

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[11] The Tribe's complaint requests relief under the treaties of 1760 and 1763, the Nonintercourse Act, the Indian Commerce Clause, Art. I, § 8, cl. 3, and the constitutional prohibition against state treaties, Art. I, § 10, cl. 1. App. 24. Reading the complaint liberally "so . . . as to do substantial justice," Fed. Rule Civ. Proc. 8(f), I would conclude that the constitutional references suffice to invoke the rule that original Indian title may not be alienated without federal approval. Cf. Brief for United States as *Amicus Curiae* in *Connecticut* v. *Mohegan Tribe*, O. T. 1980, No. 80-1365, p. 7 (describing the rule as "constitutionally based"). A narrower construction of the complaint would be especially inappropriate because the Tribe adopted the United States' brief in *Mohegan Tribe* as part of its response in the District Court to the defendants' motion to dismiss, making clear that the constitutional claims raised in the complaint were to be read to embrace the common-law rule. See Plaintiff's Memorandum in Support of Motion for Leave to File Supplemental Memorandum and Supplemental Memorandum, 1 Record, Ex. 15.

Because, under my view, the Tribe's treaty claims add nothing material for present purposes to its common-law claim, I would not decide at this time whether the 1760 and 1763 treaties independently required the United States, as successor to Great Britain, to approve any sale or lease of the 144,000 acres. Why the majority finds no need to discuss this ques-

B

The second provision of the 1959 Act relied on by the Court directs that "the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction." I agree with the Court that the word "them" must be understood to refer not only to individual Catawbas, but also to the Tribe. See *ante,* at 506–507. Clearly, however, "them" does not refer to *claims* brought by the Catawbas; the term encompasses the plaintiff in this case, but not the cause of action.

This distinction is critical. The "laws of the several States" provision of the Division of Assets Act placed the Catawbas on the same footing as non-Indians with regard to the application of state law. Just as a non-Indian's action based on South Carolina law must be brought within the time specified by the State, so a state-law action brought by a Catawba—or by the Catawba Tribe—must meet the same requirement. If a non-Indian in South Carolina brings a *federal* claim, however, the limitations period is determined by federal law. The same must hold for the federal claims raised by the Catawbas in this litigation.

Of course, the real question in this case is not whether federal law governs the limitations question, but whether federal law should borrow South Carolina's period of limitations, notwithstanding the general federal policy against such borrowing in the context of Indian land claims. My point here is that this question is not answered by the statutory instruction to apply state law to the Catawbas "in the same manner" as it is applied to non-Indians. Subjecting a group of Indians to state law to the same extent as other citizens is far different from subjecting their unique federal claims to a state statute of limitations. For non-Indians as well as Indians,

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tion, or the issue of common-law restraints on alienation, is harder to understand.

the decision whether to apply a state limitations period to a federal claim depends on whether such application is deemed contrary to federal policy. And nothing in § 5 of the Division of Assets Act unambiguously directs that, as a matter of federal policy, the Catawbas' unsettled tribal claims should be treated any differently for statute-of-limitations purposes from other tribal land claims. Indeed, there is no indication that Congress thought about such claims at all.[12]

C

The Court does not rely exclusively on the terms of the two provisions discussed above; it also emphasizes that the Division of Assets Act as a whole represented an "explicit redefinition of the relationship between the Federal Government and the Catawbas," terminating "special federal protection" for the Tribe and its members. *Ante*, at 508; see also *ante*, at 510.[13] But if we take seriously the "eminently sound and vital canon" that all ambiguities in statutes passed for the benefit of Indians are to be construed in the Indians' favor, *Northern Cheyenne Tribe*, 425 U. S., at 655, n. 7, then surely the effect of such an "explicit redefinition" must be limited to its explicit terms. The Court recognized as much in *Menominee Tribe, supra*, when it refused to read into the Menominee Termination Act an abrogation of the Menominees' treaty rights to hunt and fish. Regardless of the general thinking behind the termination policy of the 1950's, we are faced here with a particular statute, and we should not "'strain to implement [an assimilationist] policy Congress has now rejected.'" *Bryan* v. *Itasca County*, 426 U. S., at 389, n. 14, quoting *Santa Rosa Band of Indians* v. *Kings County*, 532 F. 2d 655, 663 (CA9 1975).

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[12] The Senate and House Reports both explained that the purpose of the 1959 legislation was "to distribute the bulk of the [Catawbas'] tribal assets" among the members of the Tribe. S. Rep. No. 863, 86th Cong., 1st Sess., 1 (1959); H. R. Rep. No. 910, 86th Cong., 1st Sess., 2 (1959). Each Report contained a list of the Tribe's assets; the list made no mention of the Catawbas' claim to their 18th-century treaty lands. See S. Rep. No. 863, at 3; H. R. Rep. No. 910, at 4.

[13] The majority rightly places little weight on the fact that § 5 of the 1959 Act revoked the Tribe's Constitution. The Catawbas had no tribal constitution until 1944, when they adopted one pursuant to the 1943 Memorandum of Understanding. See, *e. g.*, H. R. Rep. No. 910, 86th Cong., 1st Sess., 5 (1959). Revocation of the Constitution therefore can hardly be understood as a statement that the Tribe should cease existence or lose any pre-existing claims.

Such straining is particularly inappropriate in this case, where the statute in question was passed at the Indians' behest, was apparently intended to carry out the Indians' wishes, and received the Indians' support based on federal assurances that it would not "affect the status" of their claim against the State. One, of course, can distinguish formally, as the majority does, see *ante*, at 510, between preserving the "status" of the claim and preserving the claim's immunity from the state statute of limitations. But the distinction smacks of the kind of semantic trap that this Court consistently has attempted to avoid when construing governmental agreements with Indians and statutes ostensibly passed for the benefit of Indians. In cases involving Indian treaties, for example, it has long been the rule not only that doubtful expressions must be construed in the Indians' favor, but also that the entire treaty must be interpreted as the Indians would have understood it. See, *e. g., Choctaw Nation* v. *Oklahoma*, 397 U. S. 620, 631 (1970); *Jones* v. *Meehan*, 175 U. S. 1, 11 (1899); *Worcester* v. *Georgia*, 6 Pet. 515, 582 (1832).

The Catawbas were assured in unqualified terms that the 1959 legislation would not jeopardize their century-old grievance against the State of South Carolina. The Act itself said nothing about the claim, and nothing about statutes of limitations. No one told the Indians or the voting Members of Congress that the statute might someday prevent the Tribe from pursuing its claim in court. The Court nevertheless concludes today that the 1959 Act bars the Catawbas' claim if the limitations period under South Carolina law expired between the passage of the Act and the initiation of this lawsuit in 1980, and that this interpretation of the statute comports with the promises made to the Catawbas in the 1950's. I cannot agree with either conclusion. In my view, this decision breaks faith once again with the Tribe, and it does so in a way the statute does not require. Nothing in the text or legislative history of the Act evinces a congressional desire to mislead the Indians, or an understanding that the Act sometime might be construed as it is by the Court today.

III

Apparently, there no longer are any full-blood Catawbas, and no one now speaks the Catawba language. See Charlotte Observer, Mar. 6, 1977, p. 1C, reprinted in Hearing, at 420. Of the 1,200 or so persons currently on the tribal roll, only about 5 or 10 percent live on the 630-acre reservation still held for the Tribe by the State of South Carolina.[14] The reservation itself does not differ conspicuously from other rural neighborhoods in South Carolina. Indeed, "[a]n unobservant tourist may well drive through the reservation unawares, and many do." C. Hudson, The Catawba Nation 3 (1970). For the most part, modern-day Catawbas "think and live like ordinary Americans of the Southeast." *Ibid.*

When an Indian Tribe has been assimilated and dispersed to this extent—and when, as the majority points out, thousands of people now claim interests in the Tribe's ancestral homeland, see *ante*, at 499–500, and n. 4—the Tribe's claim to that land may seem ethereal, and the manner of the Tribe's dispossession may seem of no more than historical interest. But the demands of justice do not cease simply because a wronged people grow less distinctive, or because the rights of innocent third parties must be taken into account in fashioning a remedy. Today's decision seriously handicaps the Catawbas' effort to obtain even partial redress for the illegal expropriation of lands twice pledged to them, and it does so by attributing to Congress, in effect, an unarticulated intent to trick the Indians a century after the property changed hands. From any perspective, there is little to be proud of here.

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[14] See, *e. g.*, Hearing, at 20 (statement of Leo M. Krulitz, Interior Department Solicitor); *id.*, at 39 (statement of Claude Ayres, Member, Catawba Indian Nation Land Claim Committee); Proposed Catawba Indian Reservation Land Use Analysis 4 (1977), reprinted in Hearing, at 251, 258.

Because I do not believe that Congress in 1959 expressed an unambiguous desire to encumber the Catawbas' claim to their 18th-century treaty lands, and because I agree with Justice Black that "[g]reat nations, like great men, should keep their word," *FPC* v. *Tuscarora Indian Nation,* 362 U. S. 99, 142 (1960) (dissenting opinion), I do not join the judgment of the Court.

LEE *v.* ILLINOIS

CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT

No. 84-6807. Argued December 9, 1985—Decided June 3, 1986

Petitioner and a codefendant, charged with committing a double murder, were tried jointly in an Illinois court in a bench trial at which neither defendant testified. In finding petitioner guilty of both murders, the judge expressly relied on portions of the codefendant's confession, particularly with respect to the judge's rejection of petitioner's assertions that she had not participated in the murder of one of the victims and that she had acted either in self-defense or under intense and sudden passion in killing the other victim. The Illinois Appellate Court affirmed petitioner's convictions, rejecting her contention that her rights under the Confrontation Clause were violated by the trial judge's consideration of the codefendant's confession against her.

Held: The trial court's reliance upon the codefendant's confession as substantive evidence against petitioner violated her rights under the Confrontation Clause of the Sixth Amendment. Pp. 539-547.

(a) The right of cross-examination is included in an accused's right to confront the witnesses against him; the right to confront and to cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials. This truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a defendant without the benefit of cross-examination, since such a confession is hearsay, subject to all the dangers of inaccuracy which characterize hearsay generally, and since the accomplice may have a strong motivation to implicate the defendant and to exonerate himself. Thus, accomplices' confessions that incriminate defendants are presumptively unreliable. Pp. 539-543.

(b) On the record here, the codefendant's confession did not bear sufficient independent "indicia of reliability," *Ohio* v. *Roberts*, 448 U. S. 56, 66, to rebut the presumption of unreliability. The circumstances surrounding the confession did not rebut the presumption that the codefendant's statement could not be trusted as regards petitioner's participation in the murders. Nor is there any merit to Illinois' assertion that reliability was established because petitioner's confession and the codefendant's confession "interlocked" on some points. A codefendant's confession is not rendered reliable simply because some of the facts it contains "interlock" with the facts of the defendant's statement.

Although the confessions here overlapped in their factual recitations to a great extent, they clearly diverged with respect to petitioner's participation in the planning of one victim's death, her facilitation of the murder of the other victim, and factual circumstances relevant to the couple's premeditation. Thus, the subjects upon which the two confessions did not "interlock" cannot be characterized as irrelevant or trivial. The determination, in the first instance, of whether the error as to the trial judge's consideration of the codefendant's confession was harmless, is for the state courts. Pp. 543–547.

129 Ill. App. 3d 1167, 491 N. E. 2d 1391, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined, *post*, p. 547.

Dan W. Evers argued the cause for petitioner. With him on the briefs was *Randy E. Blue*.

Jill Wine-Banks, First Assistant Attorney General of Illinois, argued the cause for respondent. With her on the brief were *Neil F. Hartigan*, Attorney General, and *Mark L. Rotert*.

JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner and a codefendant, charged with committing a double murder, were tried jointly in a bench trial. Neither defendant testified at trial. In finding petitioner guilty as charged, the trial judge expressly relied on portions of the codefendant's confession, obtained by police at the time of arrest, as substantive evidence against petitioner. The question for decision is whether such reliance by the judge upon the codefendant's confession violated petitioner's rights as secured by the Confrontation Clause of the Sixth Amendment,[1] as applied to the States through the Fourteenth Amendment.

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[1] The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

I

In February 1982, police officers of East St. Louis asked petitioner Millie Lee to come to the police station to help identify a badly burned body that the police had discovered in an apartment in the housing complex in which Lee lived. While Lee was examining photographs of the body, a detective noticed that she began to cry. The detective advised Lee of her *Miranda* rights, and began to question her about the whereabouts of her aunt, Mattie Darden,[2] with whom Lee shared an apartment. After giving a number of confused and conflicting accounts concerning when she had last seen or talked to her aunt, Lee finally admitted that she and her boyfriend, Edwin Thomas, had been involved in the stabbing of both Aunt Beedie and her friend, Odessa Harris, and that the body was her Aunt Beedie's. At that point, the officers questioning Lee again read her her *Miranda* rights, placed her under arrest, and continued to question her. After concluding their interview with Lee, the police presented her with a typewritten account of her statement, which included at the top of the first page a recitation and waiver of her *Miranda* rights. Lee read and signed each page of the confession.

Petitioner's codefendant, Edwin Thomas, arrived at the police station, ostensibly for "questioning" about the homicides, while police officers were still in the process of interviewing Lee; nonetheless, the police apparently were sufficiently informed of Thomas' involvement such that upon his arrival, he was read his rights and confronted by an officer with his alleged participation in the murders. Thomas indicated at that point that he "wanted to think about" whether to talk to the police.

During her questioning by the police, Millie Lee had asked to see Edwin Thomas; after being advised of his rights, Thomas asked if he could see Lee. After they obtained Lee's confession, the police allowed the two to meet. Lee and Thomas were permitted to kiss and to hug, and one of the officers then asked Lee, in the presence of Thomas, "what was the statement you had just given us implicating Edwin?" Lee said to Thomas: "They know about the whole thing, don't you love me Edwin, didn't you in fact say . . . that we wouldn't let one or the other take the rap alone." Brief for Respondent 6. At that point, Thomas gave a statement to the police, which was later typed and then presented to Thomas for his review and signature.

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[2] Mattie Darden was known also as "Aunt Beety" or "Aunt Beedie."

According to Lee's statement, on the evening of February 11, 1982, she and Thomas were at home in the apartment that Lee shared with Aunt Beedie when the aunt and her friend Odessa Harris arrived at approximately 8:30 or 9 p.m. Aunt Beedie and Odessa went into the bedroom, while Lee did the dishes in the kitchen. Thomas, who had been watching television, joined Lee in the kitchen, and the two apparently had "two or three words not really an argument." Odessa then came out of the bedroom to the kitchen and asked "what the hell was going on." As related in Lee's confession, Odessa "said we ought to be ashamed of ourselves arguing and making all that noise. I told her it was none of her business that she didn't live here." Odessa returned to the bedroom. App. 6.

As Lee's account further related, after Odessa returned to the bedroom Lee called her back into the kitchen in order to confirm whether Aunt Beedie had "really" paid the rent. Odessa assured Lee that the rent had indeed been paid, and then complained once more about the fact that Lee and Thomas had been arguing. As Odessa left the kitchen to return to the bedroom, she passed Thomas and gave him "dirty looks." When Odessa turned her head Thomas got up from his chair and stabbed Odessa in the back with a 24-inch-long knife. Odessa fell on the floor, and called out to Aunt Beedie. Lee explained that she then

> "ran, well I don't know if I ran or walked into the bedroom. Edwin was standing over by the kitchen cabinet with the knife in his hand with blood on it. Odessa was

> laying there moaning. When I went into the bedroom my aunt Beety was sitting on the bed and then she got up and had a knife in her hand. I don't know where the knife came from, my aunt usually kept her gun by her bed. I don't know what kind of gun it is. When my aunt got up off the bed she told me to get out of her way or she would kill me and then she swung at me with the knife. I ran into the kitchen and got a butcher knife that was sitting on the kitchen table and then I went back into the bedroom where my aunt was and then I stabbed her. I kept stabbing her. The first time I stabbed her, I hit her in the chest, I kept stabbing her and I really don't know where else I stabbed her, I had my eyes closed some of the time." *Id.*, at 7.

Lee's statement also included an account of some of the circumstances leading up to the killing:

> "Me, and Edwin had talked about stop[p]ing aunt Mattie from harassing me before. She would come in drunk or would get on the phone and tell people that I never did anything for her that I wouldn't give her anything to eat, or anything since I had a boyfriend. . . . Edwin used to get mad when my aunt would talk about me and that he couldn't take much more of what my auntie was doing, that when he began talking about doing something to aunt Beetty *[sic]* but he never said what. Odessa was always jumping up in my face and one time about a month ago me and Odessa got into an argument about my dress that I let Odessa use and Edwin seen her get in my face that time. He, Edwin just couldn't stand to see my auntie or Odessa harass me anymore. Things just kept adding up and adding up and the night that we killed Odessa and my aunt Beetty *[sic]* Edwin just couldn't take anymore." *Id.*, at 12.

Thomas' confession paralleled Lee's in several respects. It described the argument between himself and Lee, the confrontation with Odessa in the kitchen, and the stabbings of Odessa and then Aunt Beedie. However, Thomas' statement provided an altogether different version of how he and Lee came to commit the murders. Most significantly, Thomas stated that he and Lee had previously discussed killing Aunt Beedie, and referred to conversations immediately prior to the murders that suggested a premeditated plan to kill. According to Thomas, after Odessa scolded Lee for arguing with Thomas:

> "This is when I asked [Lee] 'did she still want to go through with it?' I was referring to what we had plained *[sic]* before about killing Aunt Beedie. We had talked about doing something to Aunt Beedie, but we had not figure out just what we would do. We had never before discussed doing anything to Odessa just Aunt Beedie, because we were tired of Aunt Beedie getting drunk, and coming home and 'going off' on [Lee]. . . . After asking [Lee], 'did she still want to do it?' [Lee] first gave me a funny look, as though she was not going to do it, she stared into space for awhile, then she looked at me and said, 'yes.'
>
> "We decided that if we did something to Aunt Beedie, we had to do somthing *[sic]* with Odessa. We wanted Odessa to leave, but she stayed there. We had plained *[sic]* that [Lee] was suppose *[sic]* to get Odessa to stand, with her back toward the front room, looking into the kitchen, while I would grab her from the back, using the big knife." *Id.*, at 17–18.

Lee's statement, by contrast, suggested that it was Thomas who had been provoked by Aunt Beedie's behavior and Thomas who had snapped the night of the murders. Her statement made no mention of an alleged decision by herself and Thomas to "go through with it," nor, of course, did it indicate that the two had formulated a plan to induce Odessa to return to the kitchen where Thomas would kill her. On the contrary, Lee asserted that on the night of the killings "Edwin just couldn't take anymore."

Lee and Thomas were charged in a two-count indictment with murder. Count one charged them with the murder of Aunt Beedie, and count two with the murder of Odessa. They were appointed separate counsel for trial.

On the day of trial, counsel for the two defendants withdrew motions for severance and for trial by jury. In withdrawing the motion for separate trials, counsel for Thomas explained that "[s]ince we are having a Bench Trial, the Court would only consider the evidence proper to each defendant, we feel that there is no longer any need for that motion." The court then asked petitioner's lawyer whether that was her understanding as well. She replied: "Yes, your Honor. I have conferred with Miss Lee. We would ask the Court to consider the evidence separately for each defendant." The judge replied: "It will be done that way." Tr. 3.

Neither defendant testified at trial, except on behalf of their respective motions to suppress their statements on the ground that they were given involuntarily, motions that were denied by the trial judge.

At trial both the prosecution and the defendants relied heavily on the confessions. In closing, counsel for petitioner called the court's attention to Lee's confession, and argued that it showed that Lee was "not responsible for the death of Odessa Harris. . . . As I read her statement, she was not personally involved in the stabbing of Odessa Harris. Mr. Thomas was." *Id.*, at 232–233. Counsel maintained that under Illinois law, in order to be guilty of murder a person must be involved before or during the commission of the offense, and that Lee's confession simply could not fairly be read to support such a finding. With respect to Aunt Beedie's killing, counsel urged the court to consider the lesser charge of voluntary manslaughter. According to counsel, Lee's statement indicated that Aunt Beedie had had a knife, that Lee and Aunt Beedie had struggled, and that the stabbing occurred as a result of that struggle. Counsel suggested that Lee had acted either upon the "unreasonable belief that her act of stabbing Mattie Darden constituted self-defense" or, in the alternative, that the killing "was the result of a sudden and intense passion resulting from serious provocation." Brief for Petitioner 5.

In rebuttal, the prosecutor described Lee's arguments in support of lesser offenses as "interesting." He answered the suggestion that the evidence showed insufficient intent to support murder by asserting that "once you read the confession of Millie Lee, you will note that she indicates in her statement that before anything begins, . . . that she and Edwin spoke together . . . at which time Edwin asked her, 'Are you ready?' And she, after thinking awhile, said, 'Yes.'" The prosecutor maintained that this exchange, which he incorrectly attributed to Lee's statement, and which had in fact appeared only in Thomas' confession, demonstrated a willingness on the part of Lee to "go through with whatever plan" the two had formulated with respect to the victims, and thus that there had been an agreement to kill. The State also argued in closing—again erroneously drawing from Thomas', not Lee's, confession—that Lee "did in fact aid and assist and encourage this whole operation, by drawing Odessa out of the bedroom"; the prosecutor argued that this was evident from Thomas' statement that it was necessary to kill Odessa in order to go ahead with the plan to kill Aunt Beedie. To prove Lee's intent to kill and to rebut her theories of self-defense and sudden and intense passion, the State pointed to Thomas' assertion that he had asked Lee if she was willing to go through with what they had talked about, and her reply "I'm scared, but I will go through with it."[3] Tr. 236.

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[3] It is evident that the prosecutor, in arguing Lee's guilt, invited the court to consider Thomas' confession, an invitation that the court accepted and which generated the error that we address in this opinion. However, there has been no claim made regarding the significance, if any, of prosecu-

In finding Lee guilty of the murders of Aunt Beedie and Odessa, and explaining why he rejected Lee's assertions that she had not participated in the killing of Odessa and that she acted either in self-defense or under intense and sudden passion with respect to the stabbing of Aunt Beedie, the trial judge expressly relied on Thomas' confession and his version of the killings, particularly with respect to the decision to kill Aunt Beedie allegedly made earlier by Lee and Thomas. Lee's contentions, the judge declared, were

> "disputed by the statement of her co-defendant, who stated that he asked Miss Lee do you want to go through with it. A previously conceived plan to dispose of Miss Darden. And after some thinking . . . she responded that she did. There is no showing that they acted under a sudden and intense passion, in fact prior to the stabbing, according to his own confession, the defendant took a knife . . . and awaited the arrival of Miss Harris into the kitchen, in fact had his co-defendant call her so she could come out. Now that isn't a sudden and intense passion." App. 25.

Lee was sentenced to a term of 40 years' incarceration for the murder of Odessa, and life imprisonment for the murder of Aunt Beedie.

On appeal, Lee contended, among other things, that her Confrontation Clause rights were violated by the trial court's consideration of Thomas' confession against her. The state appeals court conceded that the trial court considered Thomas' confession in finding Lee guilty, but held that since the defendants' confessions were "interlocking," they did not fall within the rule of *Bruton* v. *United States*, 391 U. S. 123 (1968), which, the court stated, was that the "admission of a codefendant's extrajudicial statement that inculpates the

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torial misconduct or mistake that results in inadmissible hearsay evidence being brought to the attention of the factfinder, and we thus do not address the question.

other defendant violates the defendant's Sixth Amendment right to confront witnesses against him." 129 Ill. App. 3d 1197, 491 N. E. 2d 1391 (1984). The court did not explain what it meant by saying that the confessions were "interlocking," how the confessions interlocked, or how or why the *Bruton* analysis would be altered when confessions did interlock. The Illinois Supreme Court denied leave to appeal. We granted certiorari. 473 U. S. 904 (1985).

II

The State of Illinois concedes that this case involves the use of a codefendant's confession as substantive evidence against petitioner. Brief for Respondent 9. Illinois also correctly recognizes that the admissibility of the evidence as a matter of state law is not the issue in this case; rather, it properly identifies the question presented to be "whether that substantive use of the hearsay confession denied Petitioner rights guaranteed her under the Confrontation Clause. . . ." *Id.*, at 11. It contends, in essence, that Lee's Sixth Amendment rights were not violated because Thomas was unavailable and his statement was "reliable" enough to warrant its untested admission into evidence against Lee. See *Ohio* v. *Roberts*, 448 U. S. 56 (1980). We need not address the question of Thomas' availability, for we hold that Thomas' statement, as the confession of an accomplice, was presumptively unreliable and that it did not bear sufficient independent "indicia of reliability" to overcome that presumption.

A

In *Pointer* v. *Texas*, 380 U. S. 400 (1965), this Court unanimously held that the Confrontation Clause was applicable to the States, and in doing so, remarked that it "cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him." *Id.*, at 404. Citing and quoting from such cases as *Kirby* v. *United States*, 174 U. S. 47 (1899), *Alford* v. *United States*, 282 U. S. 687 (1931), *Greene* v. *McElroy*, 360 U. S. 474 (1959), *In re Oliver*, 333 U. S. 257 (1948), and *Turner* v. *Louisiana*, 379 U. S. 466 (1965), we observed that "[t]here are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in the expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer, supra,* at 405.

On one level, the right to confront and cross-examine adverse witnesses contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails. To foster such a system, the Constitution provides certain safeguards to promote to the greatest possible degree society's interest in having the accused and accuser engage in an open and even contest in a public trial. The Confrontation Clause advances these goals by ensuring that convictions will not be based on the charges of unseen and unknown—and hence unchallengeable—individuals.

But the confrontation guarantee serves not only symbolic goals. The right to confront and to cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials. In *California* v. *Green*, 399 U. S. 149, 158 (1970), we identified how the mechanisms of confrontation and cross-examination advance the pursuit of truth in criminal trials. Confrontation, we noted,

> "(1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness making his statement, thus aiding the jury in assessing his credibility" (footnote omitted). *Ibid.*

Our cases recognize that this truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination. As has been noted, such a confession "is hearsay, subject to all the dangers of inaccuracy which characterize hearsay generally. . . . More than this, however, the arrest statements of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence." *Bruton* v. *United States*, 391 U. S., at 141 (WHITE, J., dissenting) (citations omitted).

Thus, in *Douglas* v. *Alabama*, 380 U. S. 415 (1965), we reversed a conviction because a confession purportedly made by the defendant's accomplice was read to the jury by the prosecutor. Because the accomplice in that case, while called to the witness stand, invoked his privilege against self-incrimination and refused to answer questions put to him, we held that the defendant's "inability to cross-examine [the accomplice] as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause." *Id.*, at 419. This holding, on which the Court was unanimously agreed, was premised on the basic understanding that when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination.

Over the years since *Douglas*, the Court has spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants. Even Justice Harlan, who was generally averse to what he regarded as an expansive reading of the confrontation right, stated that he "would be prepared to hold as a matter of due process that a confession of an accomplice resulting from formal police interrogation cannot be introduced as evidence of the guilt of an accused, absent some circumstance indicating authorization or adoption." *Dutton* v. *Evans*, 400 U. S. 74, 98 (1970) (concurring in judgment).

Our ruling in *Bruton* illustrates the extent of the Court's concern that the admission of this type of evidence will distort the truthfinding process. In *Bruton*, we held that the Confrontation Clause rights of the petitioner were violated when his codefendant's confession was admitted at their joint trial, despite the fact that the judge in that case had carefully instructed the jury that the confession was admissible only against the codefendant. We based our decision in *Bruton* on the fact that a confession that incriminates an accomplice is so "inevitably suspect" and "devastating" that the ordinarily sound assumption that a jury will be able to follow faithfully its instructions could not be applied. *Bruton*, *supra*, at 136.

Although in the present case the state court apparently relied on *Bruton* in reaching its decision, this is not strictly speaking a *Bruton* case because we are not here concerned with the effectiveness of limiting instructions in preventing spill-over prejudice to a defendant when his codefendant's confession is admitted against the codefendant at a joint trial. Rather, this case is strikingly similar to *Douglas*. Here, as in *Douglas*, the State sought to use hearsay evidence as substantive evidence against the accused. In both cases, the hearsay in question was a confession made by an alleged accomplice, and in neither case was the defendant able to confront and cross-examine the declarant. Whatever differences there are between the cases show clearly that in the present case the Confrontation Clause concerns are of even greater consequence than in *Douglas*. In *Douglas*, the accomplice's confession was read by the prosecutor to the uncooperative declarant in order to "refresh [his] recollection," 380 U. S., at 316, and was thus technically not evidence that was admitted against the accused; in the present case, Thomas' statement was, of course, admitted into evidence by the judge following a suppression hearing. Moreover, here, unlike *Douglas*, it is not necessary to speculate as to whether the factfinder would consider the uncross-examined hearsay; the judge expressly so relied. In this case the Court does not address a hypothetical. The danger against which the Confrontation Clause was erected—the conviction of a defendant based, at least in part, on presumptively unreliable evidence—actually occurred.

B

Illinois contends that Thomas' statement bears sufficient "indicia of reliability" to rebut the presumption of unreliability that attaches to codefendants' confessions, citing as support our decision in *Ohio* v. *Roberts*, 448 U. S., at 66 (citations omitted). While we agree that the presumption may be rebutted, we are not persuaded that it has been in this case.

In *Roberts*, we recognized that even if certain hearsay[4] evidence does not fall within "a firmly rooted hearsay exception" and is thus presumptively unreliable and inadmissible for Confrontation Clause purposes, it may nonetheless meet Confrontation Clause reliability standards if it is supported by a "showing of particularized guarantees of trustworthiness." *Ibid.* However, we also emphasized that "[r]eflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.'"

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[4] We have previously turned to McCormick's definition of hearsay as "testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." E. Cleary, McCormick on Evidence § 246, p. 584 (2d ed. 1972). We have also quoted approvingly McCormick's caveat that "[s]implification has a measure of falsification." *Ibid.* (quoted in *Ohio* v. *Roberts*, 448 U. S., at 62, n. 4).

Id., at 65, quoting *Snyder* v. *Massachusetts*, 291 U. S. 97, 107 (1934). Illinois' asserted grounds for holding Thomas' statement to be reliable with respect to Lee's culpability simply do not meet this standard.[5]

First, contrary to Illinois' contention, the circumstances surrounding the confession do not rebut the presumption that Thomas' statement could not be trusted as regards Lee's participation in the murders. When Thomas was taken in for questioning and read his rights he refused to talk to the police. The confession was elicited only after Thomas was told that Lee had already implicated him and only after he was implored by Lee to share "the rap" with her. The unsworn statement was given in response to the questions of police, who, having already interrogated Lee, no doubt knew what they were looking for, and the statement was not tested in any manner by contemporaneous cross-examination by counsel, or its equivalent. Although, as the State points out, the confession was found to be voluntary for Fifth Amendment purposes, such a finding does not bear on the question of whether the confession was also free from any desire, motive, or impulse Thomas may have had either to mitigate the appearance of his own culpability by spreading the blame or to overstate Lee's involvement in retaliation for her having implicated him in the murders. It is worth noting that the record indicates that Thomas not only had a theoretical motive to distort the facts to Lee's detriment, but that he also was actively considering the possibility of becoming her adversary: prior to trial, Thomas contemplated becoming a witness for the State against Lee. This record evidence documents a reality of the criminal process, namely, that once partners in a crime recognize that the "jig is up," they tend to lose any identity of interest and immediately become antagonists, rather than accomplices.

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[5] We reject respondent's categorization of the hearsay involved in this case as a simple "declaration against penal interest." That concept defines too large a class for meaningful Confrontation Clause analysis. We decide this case as involving a confession by an accomplice which incriminates a criminal defendant.

We also reject Illinois' second basis for establishing reliability, namely, that because Lee's and Thomas' confessions "interlock" on some points, Thomas' confession should be deemed trustworthy in its entirety. Obviously, when codefendants' confessions are identical in all material respects, the likelihood that they are accurate is significantly increased. But a confession is not necessarily rendered reliable simply because some of the facts it contains "interlock" with the facts in the defendant's statement. See *Parker* v. *Randolph*, 442 U. S. 62, 79 (1979) (BLACKMUN, J., concurring in part and concurring in judgment). The true danger inherent in this type of hearsay is, in fact, its selective reliability. As we have consistently recognized, a codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another. If those portions of the codefendant's purportedly "interlocking" statement which bear to any significant degree on the defendant's participation in the crime are not thoroughly substantiated by the defendant's own confession, the admission of the statement poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment. In other words, when the discrepancies between the statements are not insignificant, the codefendant's confession may not be admitted.

In this case, the confessions overlap in their factual recitations to a great extent. However, they clearly diverge with respect to Lee's participation in the planning of her aunt's death, Lee's facilitation of the murder of Odessa, and certain factual circumstances relevant to the couple's premeditation. For example, Lee's confession states that Thomas was "talking about doing something to aunt Beetty *[sic]* but he never said what," App. 12, and does not refer at all to the joint plan to do "something to Aunt Beedie" which Thomas repeatedly mentions in his confession. *Id.*, at 17. Nor does Lee's confession give any indication that Lee and Thomas colluded to "do somthing *[sic]* with Odessa," *id.*, at 18, as does Thomas' statement. Lee states that she called Odessa into the kitchen only to discuss the rent and that Thomas assaulted Odessa after Odessa had left the kitchen, given Thomas a "dirty loo[k]," and was walking toward the bedroom. *Id.*, at 6. By contrast, Thomas indicates that "[Lee] was suppose *[sic]* to get Odessa to stand, with her back toward the front room, looking into the kitchen" so that Thomas could stab her from the back, *id.*, at 18, and that he actually attacked Odessa while she was in the kitchen at Lee's beckoning. *Id.*, at 19. Finally, there are certain factual discrepancies in the two statements which bear on Lee's alleged pre-existing intent to kill the two women. For example, Thomas states that the couple had thought to put on gloves before the killings, *id.*, at 20, while Lee states that they put on gloves only to dispose of the bodies. *Id.*, at 10.

The subjects upon which these two confessions do not "interlock" cannot in any way be characterized as irrelevant or trivial. The discrepancies between the two go to the very issues in dispute at trial: the roles played by the two defendants in the killing of Odessa, and the question of premeditation in the killing of Aunt Beedie.

In sum, we are not convinced that there exist sufficient "indicia of reliability," flowing from either the circumstances surrounding the confession or the "interlocking" character of the confessions, to overcome the weighty presumption against the admission of such uncross-examined evidence. We therefore hold that on the record before us, there is no occasion to depart from the time-honored teaching that a codefendant's confession inculpating the accused is inherently unreliable, and that convictions supported by such evidence violate the constitutional right of confrontation.[6]

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[6] Illinois makes the somewhat surprising argument—an argument, incidentally, that was not made before the state court—that this case does not

By holding that the consideration of Thomas' untested confession against Lee violated Lee's Confrontation Clause rights, we do not foreclose the possibility that this error was harmless when assessed in the context of the entire case against Lee. See *Schneble* v. *Florida*, 405 U. S. 427 (1972). However, because the Illinois courts are in a better position to assess the remaining evidence in light of the substantive state law of murder, we leave this determination in the first instance to the state courts. Accordingly, the judgment of the Appellate Court of Illinois, Fifth Judicial District, is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE REHNQUIST join, dissenting.

I yield to no one in my respect for the Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth. And I do not denigrate the lofty precepts that have been developed to strengthen its enforcement. I feel, however, that at times this Court tends to be

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present any Confrontation Clause issue since Lee was afforded an opportunity to cross-examine Thomas during the suppression hearing. We disagree.

The function of a suppression hearing is to determine the voluntariness, and hence the admissibility for Fifth Amendment purposes, of a confession. The truth or falsity of the statement is not relevant to the voluntariness inquiry, and no such testimony was given by Thomas. Counsel for both Lee and Thomas specifically stated that their clients were testifying "for purposes of the motion to suppress the confession only." Tr. 205, 219. Before either defendant took the stand, the court announced: "Let the record show the testimony of this defendant will be used solely for the purpose of sustaining the motion to suppress previously made." *Id.*, at 205.

Thus, there was no opportunity to cross-examine Thomas with respect to the reliability of the statement, especially as it may have related to Lee, and thus no opportunity for cross-examination sufficient to satisfy the demands of the Confrontation Clause. Cf. *Jackson* v. *Denno*, 378 U. S. 368, 376–377 (1964) (A defendant's constitutional right to a hearing to object to the use of a confession involves a determination of voluntariness, "a determination uninfluenced by the truth or falsity of the confession").

overly concerned with theory and pronounced principles for their own sake, and to disregard the significant realities that so often characterize a criminal case. There is a real world as well as a theoretical one.

This case, centering on two senseless and reprehensible East Saint Louis murders, is illustrative. Petitioner Millie R. Lee and her friend and codefendant, Edwin R. Thomas, each confessed to extensive and cooperative involvement in the crimes. Their corroborated and mutually reinforcing statements stand in vivid contrast to the blame-it-on-the-other-person and buck-passing posturing that usually develops when criminal accomplices are apprehended and each endeavors to rescue himself or herself at the expense of the other. We have nothing of that kind here.

I agree with the Court that this case is governed by *Ohio* v. *Roberts*, 448 U. S. 56 (1980). Under the principles enunciated in that case, Thomas' confession was constitutionally admissible against petitioner *only* if Thomas was "unavailable" as a witness *and* the confession bore sufficient "indicia of reliability." *Id.*, at 65–66. These two requirements serve to ensure that an out-of-court statement is admitted only when it does not threaten the central mission of the Confrontation Clause, which is "to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.'" *Dutton* v. *Evans*, 400 U. S. 74, 89 (1970) (plurality opinion), quoting *California* v. *Green*, 399 U. S. 149, 161 (1970). Because I believe that each of the *Roberts* requirements was satisfied in this case, I conclude that the trial court's use of the accomplice's confession as evidence against petitioner was constitutionally permissible.[1]

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[1] As the Court points out, *ante*, at 539, the admissibility of Thomas' confession under Illinois law is not the issue in this case and does not control the question of constitutional admissibility.

I

Recognizing "the Framers' preference for face-to-face accusation," this Court has construed the Confrontation Clause to embody in general "a rule of necessity." *Ohio* v. *Roberts*, 448 U. S., at 65. When a witness is available to testify in court, his prior statement, even if reliable, generally will be inadmissible to prove the truth of what it asserts unless the witness is produced for cross-examination. See *California* v. *Green*, 399 U. S., at 158; *Barber* v. *Page*, 390 U. S. 719 (1968). "In the usual case . . . the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." *Roberts*, 448 U. S., at 65.[2]

For all practical purposes, Thomas was unavailable as a prosecution witness. Although physically present in the courtroom, he clearly would have invoked his privilege against self-incrimination if called to the stand to describe the murders he had committed with petitioner.[3] Indeed, it is precisely Thomas' Fifth Amendment privilege that brought the Confrontation Clause into this case in the first place: although the State "produced" Thomas in court, his right not to testify against himself made him effectively unavailable for cross-examination by petitioner. See *Douglas* v. *Alabama*, 380 U. S. 415, 419 (1965). In much the same way, Thomas' testimony was unavailable to the State. See *Phillips* v. *Wyrick*, 558 F. 2d 489, 494 (CA8 1977), cert. denied, 434 U. S. 1088 (1978).

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[2] As this Court recently explained in *United States* v. *Inadi*, 475 U. S. 387 (1986), a specific showing of unavailability is not always required. I nonetheless assume, for purposes of discussion, that in relevant respects Thomas' custodial confession is more like the prior judicial testimony at issue in *Roberts* than like the contemporaneous co-conspirator statements involved in *Inadi*, and thus that both *Roberts* requirements had to be satisfied.

[3] Because the State did not call Thomas to testify, he did not expressly invoke his Fifth Amendment privilege. In the circumstances of this case, however, the absence of this formality is not decisive. Cf. *United States* v. *Thomas*, 571 F. 2d 285, 288 (CA5 1978). Not only would such an effort by the State have been futile, but also Thomas' presence in the courtroom made him as available to petitioner as to the prosecution. Thus, in the exceedingly unlikely event that Thomas would have testified if called, there was no significant denial of petitioner's right to confrontation, because petitioner herself could have called Thomas and questioned him, if necessary, as an adverse witness. The Confrontation Clause does not require that cross-examination actually occur; it requires only that a defendant be given the opportunity for cross-examination or its functional equivalent. See *Ohio* v. *Roberts*, 448 U. S. 56, 70–71 (1980).

Illinois, of course, had weapons that petitioner lacked. For example, the State could have offered Thomas a favorable sentencing recommendation, or the opportunity to plead guilty to a lesser offense, in exchange for his testimony against petitioner. Alternatively, the State could have tried Thomas separately and granted him immunity from the use of his inculpatory testimony against petitioner. See *Kastigar* v. *United States*, 406 U. S. 441 (1972). Measures of this kind, however, entail significant costs. A plea agreement necessarily compromises the community's legitimate correctional interests, and a grant of immunity places a heavy evidentiary burden on any future prosecution of the witness. See *id.*, at 460–461. I cannot conclude that the possibility of such an arrangement with petitioner's codefendant rendered him an available witness for purposes of the Confrontation Clause.

My unwillingness reflects in part a respect for established principles of the law of evidence. Although the Confrontation Clause differs in significant ways from the common-law rule against the introduction of hearsay, the two "stem from the same roots," *Dutton* v. *Evans*, 400 U. S., at 86 (plurality opinion), and "protect similar values," *California* v. *Green*, 399 U. S., at 155. As a consequence, analysis under the Confrontation Clause properly is informed, although not constrained, by hearsay principles developed over time by courts and legislatures. See, *e. g.*, *Roberts*, 448 U. S., at 66. Among those principles is the generally accepted notion that witnesses who successfully invoke the privilege against self-incrimination are "unavailable" for purposes of determining whether their prior statements are admissible under an exception to the hearsay rule. See *California* v. *Green*, 399 U. S., at 168, n. 17; Fed. Rule Evid. 804(a)(1); E. Cleary, McCormick on Evidence § 253 (3d ed. 1984). The judgment embodied in that notion—that a witness who validly invokes the privilege is unavailable as a practical matter to testify—seems to me to be sound, and I see no reason to take a different approach under the Confrontation Clause. I therefore conclude that Thomas was unavailable as a witness.

II

I also conclude, in the circumstances of this case—and the Court should be realistic about these issues—that the confession of petitioner's codefendant bore adequate "indicia of reliability" to allow its admission into evidence against petitioner. Chief among these indicia is the fact that Thomas' statements were thoroughly and unambiguously adverse to his penal interest. See *United States* v. *White*, 553 F. 2d 310, 314 (CA2), cert. denied, 431 U. S. 972 (1977). The hearsay exception for declarations against interest is firmly established; it rests upon "the principle of experience that a statement asserting a fact distinctly against one's interest is unlikely to be deliberately false or heedlessly incorrect." 5 J. Wigmore, Evidence § 1457, p. 329 (J. Chadbourn rev. 1974).[4] Again, I recognize that the requirements of the

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[4] The old view that the interest must be proprietary or pecuniary, not penal, by now has been fully discredited. The refusal of the common law to exempt statements against penal interest from the hearsay rule usually is traced to the decision of the House of Lords in the *Sussex Peerage Case*, 11 Cl. & F. 85, 8 Eng. Rep. 1034 (1844), a case Wigmore describes as "not strongly argued and not considered by the judges in the light of the precedents," 5 J. Wigmore, Evidence § 1476, p. 351 (J. Chadbourn rev. 1974). The doctrine announced there has been termed "barbarous," *id.*, § 1477, p. 360, and "indefensible in logic," Advisory Committee's Notes on Fed. Rule Evid. 804(b)(3), 28 U. S. C. App., p. 733. The rationale for allowing admission of declarations against interest applies no less forcefully when

Confrontation Clause and the hearsay rule often diverge. But statements squarely within established hearsay exceptions possess "the imprimatur of judicial and legislative experience," G. Lilly, An Introduction to the Law of Evidence § 78, pp. 277–278 (1978), and that fact must weigh heavily in our assessment of their reliability for constitutional purposes. See *Roberts*, 448 U. S., at 66.

The majority points out correctly, *ante*, at 541–542, that the Court customarily has treated the confessions of codefendants with suspicion. Never, however, has the Court held such confessions *per se* inadmissible under the Confrontation Clause,[5] and the suspicion the Court has shown in no way contradicts the general reliability of statements against penal interest. Indeed, accomplice confessions ordinarily are untrustworthy precisely because they are *not* unambiguously adverse to the penal interest of the declarant. It is of course against one's penal interest to confess to criminal complicity, but often that interest can be advanced greatly by ascribing the bulk of the blame to one's confederates. It is in circum-

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the declarant concedes criminal instead of civil liability; indeed, "no other statement is so much against interest as a confession of murder." *Donnelly* v. *United States*, 228 U. S. 243, 278 (1913) (Holmes, J., dissenting). Accordingly, most jurisdictions now allow the introduction, in appropriate circumstances, of out-of-court declarations against penal interest. See E. Cleary, McCormick on Evidence § 278 (3d ed. 1984); Fed. Rule Evid. 804(b)(3).

[5] In *Bruton* v. *United States*, 391 U. S. 123 (1968), the inadmissibility of the codefendant's out-of-court statements against the defendant was not contested; the question was whether limiting instructions were constitutionally adequate to ensure that the jury considered the codefendant's statements only against the codefendant and not against the defendant. See *id.*, at 128, n. 3 ("There is not before us . . . any recognized exception to the hearsay rule . . . and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause"); see also *Dutton* v. *Evans*, 400 U. S. 74, 86 (1970) (plurality opinion). The *Bruton* rule thus necessarily applies only to situations in which the out-of-court statements are constitutionally inadmissible against the defendant. See *United States* v. *Kelley*, 526 F. 2d 615, 620 (CA8 1975), cert. denied, 424 U. S. 971 (1976).

stances raising the latter possibility—circumstances in which the accomplice's out-of-court statements implicating the defendant may be very much in the accomplice's penal interest—that we have viewed the accomplice's statements as "inevitably suspect." *Bruton* v. *United States*, 391 U. S. 123, 136 (1968); see also *id.*, at 141–142 (WHITE, J., dissenting) ("Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence").

Such circumstances were presented starkly in *Douglas* v. *Alabama*, 380 U. S. 415 (1965). The accomplice's confession in that case was "of crucial importance" because it identified the defendant as the triggerman. *Id.*, at 417, and n. 3. Only one shot had been fired, and it obviously was in the accomplice's penal interest to convince the authorities that he was not the one who fired it. By "fingering" the defendant, he minimized his own criminal culpability.

In the present case, however, there is little reason to fear that Thomas' statements to the police may have been motivated by a desire to shift blame to petitioner. Thomas' confession was less favorable in all respects to his own interests than petitioner's confession, and there is no claim by either side that Thomas actually was more culpable than either he or petitioner admitted. Also, Thomas' description of petitioner's involvement in the murders in no way diminished his own complicity. This is particularly so with respect to the matter for which the trial judge relied on Thomas' confession, namely, the joint planning of the murders. Far from minimizing Thomas' own liability, the claim that the two defendants consulted about the crimes immediately before carrying them out damaged Thomas' defense just as much as petitioner's, and subjected both defendants to possible charges of criminal conspiracy.[6]

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[6] Thomas' statement to the police therefore differs significantly from the typical confession implicating an accomplice. In most cases, the inculpation of the accomplice is "collateral" to the confession, in that the allega-

Not only was Thomas' confession unambiguously adverse to his own penal interest, but it was also extensively corroborated by other evidence introduced at trial. Perhaps the strongest corroboration was provided by petitioner's own confession, which mirrors Thomas' statement in striking detail. Both defendants independently told the police that the murders took place after Odessa Harris came into the kitchen to complain about their arguing. App. 6 (petitioner's confession) ("Odessa . . . asked what the hell was going on"); *id.*, at 17 (Thomas' confession) ("Odessa . . . asked, what's the hell going on"). Both defendants explained that Harris then returned to the bedroom, and that petitioner called her back to the kitchen, at which time Thomas rose from a recliner and stabbed her in the back with a long-blade knife. *Id.*, at 6–7, 18–19. According to both confessions, Odessa Harris fell to the floor and began to call for petitioner's aunt, Mattie Darden, whom petitioner then intercepted in the bedroom with a knife. *Id.*, at 7, 19. Both defendants agreed that while petitioner was in the bedroom she asked Thomas for the hammer, that Thomas could not find it, that petitioner asked Thomas to bring a skillet from the kitchen, that

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tions implicating the accomplice are not found in portions of the statement directly adverse to the declarant's penal interest. Comment, Federal Rule of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest, 66 Calif. L. Rev. 1189, 1190, n. 7 (1978).

Moreover, because Thomas' inculpation of petitioner was inseverable from those portions of the confession strongly adverse to his own penal interests, this case presents no special reason to fear that Thomas implicated petitioner in an effort to curry favor with the police. In theory, of course, the entire confession could have been a misguided effort to please the interrogating officers, see, *e. g.*, *Parker* v. *Randolph*, 442 U. S. 62, 86, and n. 6 (1979) (STEVENS, J., dissenting), but this possibility is present whenever a suspect confesses while in custody, and it renders the confession no less reliable as evidence against a codefendant than as evidence against the confessing suspect. In this case, moreover, the possibility of a false confession is rendered remote by the circumstances of Thomas' confession, and by the extensive corroboration provided by petitioner's own confession and by the physical evidence. See *infra*.

Thomas did so, and that the skillet fractured after petitioner struck Darden on the head with it once or twice. *Id.*, at 7, 20. They agreed that Thomas then brought another skillet from the kitchen, that petitioner hit her aunt once more on the head, spraying grease about the room, and that Thomas took over after telling petitioner she was not hitting hard enough. *Id.*, at 8, 20. Both defendants said they had spoken in the past about doing something to stop Darden from harassing petitioner. *Id.*, at 12, 17.[7]

The two confessions, of course, were not identical as to every detail. One could not expect them to be. In particular, the discussion just before the killings, on which the trial judge relied in rejecting petitioner's defense of "sudden and intense passion," was described only in Thomas' statement. For at least two reasons, however, this divergence does not significantly undermine the corroboration provided by petitioner's confession. First, although petitioner did not mention the discussion described by Thomas, the story she told was in no way inconsistent with the occurrence of such a discussion. Nothing she said suggested that joint planning of the kind described by Thomas had *not* taken place. Second, as noted above, Thomas' assertion that he and petitioner consulted immediately before the murders cannot be understood as an attempt to shift blame from Thomas to petitioner. Far from diminishing Thomas' culpability, that assertion increased his potential liability just as much as it did petitioner's.[8]

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[7] The confessions further agree on the details of the defendants' activities following the murders, the broad outlines of which were as follows: Petitioner and Thomas put Harris' body inside a trunk they found in Darden's bedroom and left the trunk outside by the trash. Petitioner went to a local store to buy lighter fluid, with which she and Thomas set the trunk on fire. Using clothesline and a long aluminum lawn chair, they carried Darden to a vacant apartment. They cleaned the floors of Darden's apartment. The following day, they transferred Harris' remains to a cardboard stereo box, leaving the box with the garbage. Thomas later returned to the vacant apartment and set fire to Darden's body. App. 8–11, 20–24.

In addition to the corroboration provided by petitioner's own confession, the statements given by petitioner and Thomas were fully consistent with the physical evidence. The knives used in the attacks were found where petitioner said they were hidden. See Tr. 183–184. The police also found, among other evidence, the can of lighter fluid used to ignite the bodies of both victims, see *id.*, at 21–22, the broken skillet, see *id.*, at 41–42, and both victims' remains, see *id.*, at 17–18, 67–71, 78–82, 155–157. The wounds found on Darden's body were fully in accord with the story told by both defendants. See *id.*, at 77–78.

Finally, the record amply supports the trial court's determination that the confessions were voluntary. Although petitioner and Thomas were in custody when they gave their statements, each was fully notified of his or her rights, and there is no indication of any police pressure. The interrogating officers testified at trial that the defendants appeared alert and sober during questioning, and that they were not threatened or cajoled by the police in any way. See *id.*, at 30–31, 37–38, 94–96, 104–106.

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[8] The Court in the past has divided on the significance of "interlocking" confessions for the rule announced in *Bruton* v. *United States*, 391 U. S. 123 (1968). Compare *Parker* v. *Randolph*, 442 U. S., at 74–75 (plurality opinion) (*Bruton* rule is inapplicable to cases involving interlocking confessions), with 442 U. S., at 77–81 (opinion concurring in part and concurring in judgment) (interlocking confessions may make *Bruton* error harmless but do not render the rule inapplicable), and *id.*, at 81–83 (STEVENS, J., dissenting) (same). Since *Bruton* applies only in cases where the codefendant's out-of-court statements are inadmissible against the defendant, see n. 5, *supra*, the views I expressed in *Randolph* necessarily imply, as the Court suggests, that interlocking confessions are not automatically admissible against both defendants. See *ante*, at 545. I adhere to that position. It hardly follows, however, that the corroboration provided by a defendant's own confession is *irrelevant* to a determination whether a codefendant's out-of-court statements are sufficiently reliable to be admissible against the defendant under the Confrontation Clause. Any categorical approach of that kind seems to me to be profoundly unwise.

It is the unusual conjunction of these indicia of reliability—thorough and unambiguous adversity to Thomas' penal interest, extensive and convincing corroboration by petitioner's own confession, further corroboration provided by the physical evidence, and reliable evidence of voluntariness—that persuades me in this case that the *de facto* admission of the confession of an unavailable witness as substantive evidence against petitioner did not violate the Confrontation Clause. Were any of these elements missing, the result might be different and I might well agree with the Court. Together, however, they kept this trial within constitutional bounds.

III

The Court's cases have construed the Confrontation Clause in a pragmatic fashion, requiring "substantial compliance" with its purposes, see *Ohio* v. *Roberts*, 448 U. S., at 69; *California* v. *Green*, 399 U. S., at 166, but acknowledging the need to balance the interests of the accused against the public's "strong interest in effective law enforcement," *Roberts*, 448 U. S., at 64; see also *Mattox* v. *United States*, 156 U. S. 237, 243 (1895). I share the Court's general concern regarding the use of an accomplice's confession as evidence against an accused, but I believe that in this case the practical unavailability of petitioner's codefendant as a witness for the State, together with the unusually strong and convincing indications that his statements to the police were reliable, rendered the confession constitutionally admissible against petitioner.

I respectfully dissent.

UNITED STATES ET AL. *v.* HEMME ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 84-1944. Argued March 5, 1986—Decided June 3, 1986

Prior to 1977, the Internal Revenue Code's gift tax permitted the taxpayer a lifetime exemption of $30,000 to be deducted from amounts otherwise taxable, which exemption could be claimed, in whole or in part, at any time during the taxpayer's lifetime. 26 U. S. C. § 2521 (1970 ed.). The estate tax afforded the estate a specific exemption of $60,000 in determining the amount subject to tax. § 2052 (1970 ed.). The Tax Reform Act of 1976 (new Act), which was enacted on October 4, 1976, and which became effective on January 1, 1977, created the so-called "unified credit" (deductible directly from the amount of the tax) that a taxpayer could apply either toward gift tax during life or toward estate tax after death. §§ 2010(a), 2505(a). The $30,000 exemption for gifts and the $60,000 exemption for estates were eliminated, beginning with estates of taxpayers dying after December 31, 1976, and gifts given after that date, and a phase-in schedule was established for the amount of the new unified credit. The new Act also contained a transitional rule (applicable to taxpayers who, before 1977, had used up some or all of their $30,000 gift tax exemption) providing that the amount of the unified credit "shall be reduced by an amount equal to 20% of the aggregate amount allowed as a specific exemption under section 2521 [prior to its repeal] with respect to gifts made by the decedent after September 8, 1976." § 2010(c). On September 28, 1976, a taxpayer made certain gifts, and he later filed a federal gift tax return which declared that no tax was due and in which he claimed his entire $30,000 lifetime exemption under § 2521 (1970 ed.). However, the taxpayer died just over two years later, and his estate was required by law to include in the estate all gifts made "in contemplation of death," which presumptively included all gifts made within three years of the decedent's death. § 2035 (1970 ed.). After including the 1976 gifts in the estate, the estate then claimed the unified credit of $34,000 under the new Act. However, the Internal Revenue Service (IRS) ruled that under the new Act's transitional rule in § 2010(c) the credit must be reduced by 20% of the specific gift-tax exemption claimed during the decedent's lifetime, or $6,000. The estate paid the assessed deficiency of $6,000 and ultimately a refund suit was filed by appellees (the trustee of the decedent's "revocable living trust" and the transferees of his property). The District Court held that the application of § 2010(c) to the decedent's gifts, which were made before the new Act's enactment, was so arbitrary and capricious as to violate the Due Process Clause of the Fifth Amendment.

Held:

1. There is no merit to appellees' argument, focused on the word "allowed" in § 2010(c), that Congress did not intend the transitional rule to be applied as the IRS applied it here, because when the 1976 gifts were required to be included in the estate as having been made in contemplation of death the $30,000 specific gift-tax exemption decedent had claimed became "disallowed"—a claim to a specific exemption not being "allowed" unless the taxpayer ultimately *benefited* from that exemption by paying less tax than he otherwise would have payed. Longstanding interpretation of the tax laws does not support such argument. Nor was the mere inclusion of the gifts in the gross estate tantamount to disallowance of the $30,000 exemption. Moreover, decedent did receive a benefit for his specific exemption, since he avoided any gift taxes. The application of § 2010(c) here is consistent with the statute's language and purpose. Pp. 564–567.

2. The District Court erred in finding that § 2010(c), as applied here, transgressed the Due Process Clause of the Fifth Amendment as being arbitrary and capricious because it retroactively affected the final disposition of a gift made before the statute's enactment. *Untermyer* v. *Anderson,* 276 U. S. 440, distinguished. The nature of a tax and the circumstances in which it is laid must be considered before it can be said that its retroactive application is so oppressive as to transgress the constitutional limitation. Here, in view of the applicable statutory provisions prior to the new Act, particularly the requirement of § 2035 (1970 ed.) as to inclusion in an estate of gifts made in contemplation of death, appellees were no worse off than they would have been without the enactment of the new Act. Moreover, even assuming that, as appellees asserted, the confluence of §§ 2010(c) and 2035 required them to pay tax on the same transaction twice, the Constitution was not offended since Congress clearly expressed its intention to occasion that result. Pp. 567–572.

Reversed.

MARSHALL, J., delivered the opinion for a unanimous Court.

Albert G. Lauber, Jr., argued the cause for appellants. With him on the briefs for the United States were *Solicitor*

General Fried, Assistant Attorney General Archer, Michael L. Paup, and *Ernest J. Brown.*

Edward F. Sutkowski argued the cause for appellees. With him on the brief were *Dean B. Rhoads* and *Donald C. Rikli.**

JUSTICE MARSHALL delivered the opinion of the Court.

Appellees, identified as the trustee of the "revocable living trust" of Charles W. Hirschi and transferees of Hirschi's property, seek a refund of $6,000 in estate taxes, on the ground that the Government's interpretation of a statutory transitional rule, enacted to bridge the old and new regimes for the federal taxation of gifts and estates, violates both the statute and the Constitution.

I

Prior to 1977, the gift tax and the estate tax were imposed, calculated, and collected separately. The gift tax, imposed on donors of certain gifts, permitted each taxpayer a lifetime exemption of $30,000 to be deducted from amounts otherwise taxable. 26 U. S. C. § 2521 (1970 ed.). This so-called "specific exemption" could be claimed, in whole or in part, at any time during the taxpayer's lifetime. *Ibid.* The estate tax, too, provided certain relief for modest estates. In determining the amount subject to estate tax, the estate was entitled to deduct a "specific exemption" of $60,000. § 2052 (1970 ed.).

In considering tax reform in 1976, Congress determined that several changes were necessary to ease the burden of estate and gift taxes on taxpayers of modest means. See H. R. Rep. No. 94–1380, p. 11 (1976). One such change was to transform what had been tax deductions into tax credits so that taxpayers in the lower brackets would benefit as much as those in higher brackets.[1] *Id.*, at 15. In addition, Congress decided to merge the two separate specific exemptions for gifts and estates into a single credit, believing that the prior system had favored those who could afford to make substantial lifetime transfers, while disadvantaging those who needed to maintain access to their assets until death. *Id.*, at 16. Accordingly, the Tax Reform Act of 1976 (Act) erased many of the distinctions in treatment between transfers during life and those after death, in effect treating inheritance as the final taxable gift. It created the so-called "unified credit," which a taxpayer could apply either toward gift tax during life or toward estate tax after death. 26 U. S. C. §§2010(a), 2505(a). The $30,000 specific exemption for gifts and $60,000 specific exemption for estates were eliminated, beginning with estates of taxpayers dying after December 31, 1976, and gifts given after that date. A phase-in schedule was established for the amount of the new unified credit, providing a credit of $30,000 for taxpayers dying in 1977, $34,000 for those dying in 1978, and culminating in $47,000 for decedents dying in 1981 and thereafter. 26 U. S. C. §§2010(b), 2505(b) (1976 ed.).

**David W. Carpenter, James J. Carroll,* and *Edward C. Rustigan* filed a brief for Margaret A. Paluch as *amicus curiae* urging affirmance.

The transformation from exemptions to credit left unresolved the treatment of taxpayers who, before 1977, had used up some or all of their $30,000 specific exemption to escape taxation of gifts. Without further action by Congress, those taxpayers would have gained that benefit of the old regime and theoretically would still be entitled to the entire unified credit provided by the new scheme, even though the latter credit was intended to be a substitute for the entire $90,000 worth of specific exemptions. Moreover, taxpayers with notice of the new scheme would have a great incentive to make gifts quickly and claim their specific exemptions before the unified credit was to go into effect, deliberately seeking the windfall of double exemption. See *Estate of Gawne* v. *Commissioner*, 80 T. C. 478, 483 (1983). Recognizing these possibilities, the House Ways and Means Committee reported out a bill which provided that if any portion of the $30,000 specific exemption for gifts had been claimed by a taxpayer since 1932, the unified credit otherwise available to the taxpayer would be reduced by 20% of the amount of the specific exemption already claimed. H. R. 14844, 94th Cong., 2d Sess., §§2010(c), 2505(c) (1976), reprinted in H. R. Rep. No. 94–1380, pp. 94, 131 (1976). While the legislative history does not explain the derivation of the 20% figure, the Committee apparently believed it to represent roughly the proportion of equivalence between the values of the specific exemption and the credit, taking into account average effective tax rates.

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[1] A credit has greater value to the taxpayer than a deduction or exemption. A credit directly reduces the amount of tax that must be paid, dollar for dollar, whereas a deduction reduces tax liability only indirectly by reducing the taxable estate. See R. Stephens, G. Maxfield, & S. Lind, Federal Estate and Gift Taxation ¶3.01 (4th ed. 1978).

This proposed transitional rule was amended by the Conference Committee. The conferees limited the class of covered taxpayers to those who had made gifts after September 8, 1976, the date the Conference Committee approved the measure, but before January 1, 1977, the effective date of the Act. See H. R. Conf. Rep. No. 94–1515, pp. 607–608 (1976). The Conference Committee evidently was less concerned with the possibility of double tax benefits in general than it was with preventing the intentional accretion of such benefits. See R. Stephens, G. Maxfield, & S. Lind, Federal Estate and Gift Taxation ¶3.02, pp. 3–4, n. 9 (4th ed. 1978); J. McCord, 1976 Estate and Gift Tax Reform: Analysis, Explanation and Commentary §2.13, p. 26 (1977). The Act containing this transitional rule passed both Houses of Congress on September 16, 1976, and the President signed it on October 4, 1976. It is the application of the transitional rule that is at issue in the case before us.

II

The parties have stipulated to the facts. On September 28, 1976, during the period designated as the transitional period, Charles Hirschi made gifts totaling $45,000 to five persons. Two days later, Hirschi filed a federal gift tax return declaring that no tax was due. The first $15,000 consisted of five gifts of $3,000 each, and was exempt from taxation by virtue of a statutory annual exclusion from gift tax of $3,000 per donee. See 26 U. S. C. § 2503(b) (1970 ed.). To render the remaining $30,000 also exempt from tax, Hirschi elected to claim his entire, lifetime specific exemption. By thus claiming the maximum exemptions to which the old law entitled him, Hirschi evidently hoped to reap the benefits of that law before its repeal. Had he lived three years longer, he might have come closer to realizing his hopes.

But, in poignant confirmation of Benjamin Franklin's adage, Hirschi escaped neither death nor taxes. Just over two years later, Hirschi died, and his estate was required by law to include in the gross estate all gifts made "in contemplation of death," which presumptively included all gifts made within three years of the decedent's demise. See 26 U. S. C. § 2035 (1970 ed.). After including in the estate the full $45,000 worth of gifts given on September 28, 1976, the estate then claimed its entire unified credit provided by the new Act for decedents dying in 1978, in the amount of $34,000. The Internal Revenue Service (IRS), however, concluded that, under the transitional rule, the $34,000 unified credit must be reduced by 20% of the amount of the specific exemption claimed during the decedent's lifetime, or $6,000. The IRS made an assessment of $6,000, and the estate paid the deficiency. The estate then filed an unsuccessful administrative claim for a refund, and this lawsuit followed.

The District Court for the Southern District of Illinois held that § 2010(c), as applied to Hirschi's gift, violates the Due Process Clause of the Fifth Amendment. Because the transitional rule has an effect on gifts made before its enactment, the court reasoned that the case is controlled by *Untermyer* v. *Anderson*, 276 U. S. 440 (1928), in which this Court held that the Nation's first gift tax could not be applied to gifts made before its enactment without violating due process. *Id.*, at 445. The District Court found that the application of § 2010(c) to this transaction was "so arbitrary and capricious as to render it unconstitutional." App. to Juris. Statement 6a. This Court noted probable jurisdiction of the Government's appeal, 474 U. S. 814 (1985), and we now reverse the judgment of the District Court.

III

Appellees proffer two principal arguments in support of the judgment below. First, they maintain that Congress did not intend the transitional rule to be applied as the IRS applied it in their case. Second, they contend that the employment of the transitional rule in their case offends due process. Although the District Court embarked immediately upon the constitutional claim, we shall undertake the statutory analysis first.

The transitional rule provides as follows:

> "The amount of the credit allowable under subsection (a) [the unified credit] shall be reduced by an amount equal to 20 percent of the aggregate amount allowed as a specific exemption under section 2521 (as in effect before its repeal by the Tax Reform Act of 1976) with respect to gifts made by the decedent after September 8, 1976." 26 U. S. C. § 2010(c).

Appellees focus on the word "allowed." They contend that, when the $30,000 gift was included in the Hirschi estate by reason of his death within three years of making the gift, the $30,000 specific exemption he had claimed became "disallowed"; it was improper, they argue, for the unified credit to have been diminished as if Hirschi had been "allowed" his specific exemption. Under appellees' view, a claim to a specific exemption is not "allowed" unless the taxpayer ultimately *benefits* from that exemption by paying less tax than he otherwise would have paid.

Longstanding interpretation of the tax laws provides appellees little in the way of support. This Court had occasion, in 1943, to consider an argument very similar to that propounded by appellees in this case. In *Virginian Hotel Corp.* v. *Helvering*, 319 U. S. 523 (1943), the taxpayer claimed "that 'allowed,' unlike 'allowable,' connotes the receipt of a tax benefit." *Id.*, at 526. The provision at issue there required the reduction of the basis of property by the amount of prior depreciation deductions "to the extent allowed." The taxpayer had claimed depreciation deductions in prior years, but, because other deductions for the years in question had been sufficient to produce overall losses, the deductions for depreciation had not reduced the amount of tax owed in those years. Consequently, the taxpayer argued that those deductions, although claimed, had not been "allowed," because they had not resulted in a tax benefit. The Court disagreed:

> "[W]e find no suggestion that 'allowed,' as distinguished from 'allowable,' depreciation is confined to those deductions which result in tax benefits. 'Allowed' connotes a grant. Under our federal tax system there is no machinery for formal allowances of deductions from gross income. Deductions stand if the Commissioner takes no steps to challenge them." *Id.*, at 526–527.

In this case, too, we find no suggestion that only those uses of the specific exemption that afford an ultimate tax advantage to the taxpayer are to be considered "allowed" within the meaning of § 2010(c). For the gift-tax scheme has no more machinery for formal allowance of deductions than does the income-tax scheme discussed in *Virginian Hotel*. While it is true that "the record does not reflect that the specific exemption was allowed," Brief for Appellees 17, inaction by the IRS under these circumstances suggests allowance, rather than disallowance, of the claim. See *Kilgroe* v. *United States*, 664 F. 2d 1168, 1170 (CA10 1981); *Blackhawk-Perry Corp.* v. *Commissioner*, 182 F. 2d 319, 321 (CA8 1950); *P. Dougherty Co.* v. *Commissioner*, 159 F. 2d 269, 271 (CA4 1946); *Repplier Coal Co.* v. *Commissioner*, 140 F. 2d 554, 558 (CA3 1944).

Nor is the mere inclusion of the gift in the gross estate tantamount to disallowance of the $30,000 exemption. Under § 2035, the $30,000 would have been included in the estate even if Hirschi had paid gift tax on the gift instead of claiming his specific exemption. The operation of § 2035 makes no comment upon the propriety of the claim of exemption. Thus, we cannot conclude that Congress intended inclusion of a gift made in contemplation of death in the gross estate of the donor to render the specific exemption not "allowed" within the meaning of § 2010(c).

The term "allowed" is a familiar denizen of the Tax Code. See, *e. g.*, §§ 1016(a)(20), (25). In some sections it appears unqualified, while in others, Congress has clearly embellished the term with the "tax benefit" qualification that appellees urge here. For example, in certain situations a taxpayer's "basis" in property is to be reduced "for amounts allowed as deductions . . . and resulting in a reduction of the taxpayer's taxes." §§ 1016(a)(9), (14), (16). Congress failed to so qualify the term "allowed" in § 2010(c), and we will not presume to impart to Congress an unstated intention to do so.

More importantly, Hirschi did receive a benefit for his specific exemption. He was permitted the option of deciding, in 1976, whether he would prefer to pay gift tax at that time or to claim his lifetime specific exemption and avoid paying taxes on the gift. He was granted the opportunity, knowing of the disadvantageous laws relating to gifts made in contemplation of death, to calculate the probability that he would live for three more years and escape tax on the $30,000 altogether. During his lifetime he paid no tax on the $30,000 gift, consistent with his election to use the specific exemption. The eventual effect of his decisions upon his estate cannot be said to have deprived him of the benefit Congress intended to bestow upon those in Hirschi's position. The application of § 2010(c) to reduce the unified credit of Hirschi's estate by 20% of the amount claimed as a specific exemption, therefore, is consistent with the language and purpose of the statute.

IV

We must now address the argument that led the District Court to find unconstitutional the Government's application of the transitional rule to appellees. Appellees contend that the rule "effectively imposes a retroactive penalty tax upon Mr. Hirschi's claim to the specific exemption," Brief for Appellees 33, and that it is "unreasonably harsh and oppressive," in violation of the Due Process Clause. *Id.*, at 31. In addition, appellees suggest that they have been subjected to double taxation, also without due process, see *id.*, at 32.

The District Court found that § 2010(c) transgresses the Due Process Clause because its application to appellees is arbitrary and capricious. Relying heavily on *Untermyer* v. *Anderson*, 276 U. S. 440 (1928), the court concluded that the "retroactive" operation of the legislation, insofar as it affects the final disposition of a gift made before the enactment of the statute, is unreasonable. In *Untermyer*, this Court construed the Revenue Act of 1924, which was signed on June 2 of that year and imposed a gift tax on gifts made during the entire calendar year 1924. The Court concluded that, "so far as applicable to bona fide gifts not made in anticipation of death and fully consummated prior to June 2, 1924, those provisions are arbitrary and invalid under the due process clause of the Fifth Amendment." *Id.*, at 445. The principal objection to the statute was the absence of notice; the Court endorsed the conclusion, *ibid.*, reached in *Blodgett* v. *Holden*, 275 U. S. 142, 147 (1927), where a plurality had found it "wholly unreasonable that one who, in entire good faith and without the slightest premonition of such consequence, made absolute disposition of his property by gifts should thereafter be required to pay a charge for so doing."

In *Untermyer*, *supra*, at 445, the Court explicitly recognized a distinction between retroactive taxation of genuine gifts and that of gifts made in contemplation of death; the case, therefore, is not controlling here. Moreover, *Untermyer* involved the levy of the first gift tax; its authority is of limited value in assessing the constitutionality of subsequent amendments that bring about certain changes in operation of the tax laws, rather than the creation of a wholly new tax. See *United States* v. *Darusmont*, 449 U. S. 292, 299 (1981) *(per curiam)*. Indeed, this Court has since made clear that some retrospective effect is not necessarily fatal to a revenue law. In *Milliken* v. *United States*, 283 U. S. 15 (1931), for example, the Court upheld the application of an early "gift in contemplation of death" statute, enacted in 1918, to draw into the estate of a decedent who died in 1920 a gift given in 1916, before enactment of the statute. In that case the equities were especially favorable to the taxpayer, because the gift in question was stock that had appreciated substantially following the gift, and inclusion in the estate occasioned taxation of the higher amount. Nevertheless, this Court reasoned that the validity of the tax depended, not upon its retroactive feature, but upon its nature and that of the gift. The Court upheld the levy of estate tax upon the gift on the ground that the notion of taxing gifts made in contemplation of death as part of the estate was not new, and that the donor should have known that there was a chance of increased tax burden if he chose to make what amounted to a testamentary gift during his lifetime. *Id.*, at 24.

Following the approach taken in our prior cases, we must "consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation." *Welch* v. *Henry*, 305 U. S. 134, 147 (1938). One of the relevant circumstances is whether, without notice, a statute gives a different and more oppressive legal effect to conduct undertaken before enactment of the statute. Our first task, accordingly, is to determine whether Hirschi's conduct was granted a different and more oppressive legal effect as a result of the Act. The key to resolution of this question is § 2035, which has reached back for years to affect the taxation of gifts made in contemplation of death.

Section 2035, as it applied to gifts made before 1977, provided that gifts made within three years of the donor's death would be deemed to have been made in contemplation of death, unless the estate could establish otherwise. 26 U. S. C. § 2035(b) (1970 ed.). Congress required that gifts made in contemplation of death be included in the amount of the gross estate in order to forestall any temptation on the part of taxpayers to make deathbed transfers for the purpose of evading estate taxes. See *Milliken* v. *United States*, *supra*. Even if the Act had never been passed, Hirschi's gift would have been subject to the requirements of § 2035. Our inquiry, therefore, must focus upon the operation of that provision both with and without the intervening passage of § 2010(c).

Had Congress not enacted § 2010(c), Hirschi would have claimed his $30,000 specific exemption; he would have paid no tax on that gift. When he died within three years, his estate would have been required, under § 2035, to include the gift in the estate and pay estate taxes on that $30,000. His estate would have been permitted to claim its specific exemption of $60,000 against the estate tax owed. With the enactment of § 2010(c), Hirschi claimed his $30,000 specific exemption; he paid no tax on that gift. When he died within three years, his estate was required, under § 2035, to include the gift in the estate and pay estate taxes on that $30,000. His estate was permitted to claim its entire unified credit of $34,000, *minus $6,000*, against the estate tax owed.

The operative comparison, then, is between a specific exemption of $60,000, available to the estate under the old law, and a unified credit from which $6,000 has been subtracted, available to appellees under the new Act. As discussed above, Congress reasonably determined that the entire unified credit would provide a substitute for *both* the $30,000 specific exemption for lifetime gifts *and* the $60,000 specific exemption for estates.[2] Mindful that, under the old law, the estate would have been entitled to claim $60,000—only two-thirds of the taxpayer's entire $90,000 exemption—we cannot be surprised to discover that, under the new Act, too, the estate is entitled to something less than the full unified credit otherwise available. Here, Congress quite fairly decided that the credit should be reduced by 20% of the specific exemption previously taken, a favorable exchange for the taxpayer.[3] Taking into account Congress' equation, then, we cannot but deduce that appellees are no worse off than they would have been without the enactment of the Act. Appellees reach a different conclusion only by comparing Hirschi's position, not to that of another taxpayer subject to § 2035, but to that of a person who did not die within three years of making the gift, a person not similarly situated with respect to the relevant legal criteria.

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[2] This determination was entirely reasonable from the standpoint of the taxpayer, as the unified credit resulted in an overall increase in tax savings over that provided by the specific exemptions. For example, Hirschi's estate was subject to a 34% marginal rate of tax, and consequently the estate's $60,000 specific exemption would have yielded a tax reduction of $20,400. Using the unified credit of the new Act, however, the estate enjoyed a tax reduction of $28,000.

[3] Of course, a numerical comparison between the exemptions and the credit is not entirely fruitful because Congress intended in the Act to increase the overall amount of gifts and estates exempted from tax. See H. R. Rep. No. 94–1380, p. 11 (1976). Nevertheless, simple mathematics suggests that, if a unified credit of $47,000 were to be deemed comparable in some sense to $90,000 in exemptions, then one would expect the credit to be reduced by as much as 52% of the exemption claimed, instead of 20%. Taking account of varying tax rates, Congress clearly acted fairly when it settled on the 20% figure.

Other circumstances of Hirschi's transaction confirm our conclusion that appellees have not suffered different and oppressive treatment as a result of the Act. First, § 2035 had long been in effect at the time Hirschi made his gift, and it is § 2035 that contains the principal retroactive feature involved in this case, requiring the estate to reach back and embrace a gift made over two years previously. Moreover, Hirschi had no expectation at the time of the gift that he would be entitled to any particular amount of a unified credit, that credit not yet having been created. Especially if the amount of the credit that his estate was ultimately allotted resulted in no greater a tax than the estate would have owed under the old law, the retroactive aspect of the law could not be said to be oppressive or inequitable. Appellees concede that, even taking into account the operation of § 2010(c), they still have paid estate taxes of $655.16 *less* than they would have paid had the 1976 Act never been passed. While the amount of tax is not dispositive, it is one circumstance of the transaction to be considered under *Milliken*. Under these circumstances, we have no difficulty concluding that, even if § 2010(c) can be considered to be retroactive taxation, a question that we do not answer, the provision represents a fair judgment by Congress that does not deprive appellees of anything to which they can assert a constitutional right.

Appellees also protest that the confluence of §§ 2010(c) and 2035 has required them to pay tax on the same transaction twice. By reducing the unified credit by $6,000, they argue, the IRS has effectively made the estate liable for gift tax on the $30,000, while also assessing estate tax on the same $30,000. Yet we have concluded above that appellees have not been taxed more oppressively than have any taxpayers unfortunate enough to be subject to § 2035. "There is no doubt of the power of Congress to provide for including in the gross estate of a decedent, for purposes of the death tax, the value of gifts made in contemplation of death." *Heiner* v. *Donnan*, 285 U. S. 312, 324 (1932). We need not decide here whether that inclusion results in double taxation, for even if it did, the Constitution would not be offended as long as Congress had clearly expressed its intention to occasion the result. *Patton* v. *Brady*, 184 U. S. 608, 621 (1902). Congress clearly intended, in § 2035, to gather Hirschi's $30,000 gift into the estate; equally clear is the legislative purpose to reduce the unified credit whenever the specific exemption for lifetime gifts was used during the transitional period. There being no ambiguity in the statute, even if one could construe the treatment of Hirschi as double taxation, the Constitution would not stand in its way. *Hellmich* v. *Hellman*, 276 U. S. 233, 238 (1928).

V

The application of § 2010(c) to reduce the credit available to the Hirschi estate by $6,000 is not inconsistent with the statute or the Due Process Clause of the Constitution. Accordingly, the judgment of the District Court is

Reversed.

BROWN-FORMAN DISTILLERS CORP. *v.* NEW YORK STATE LIQUOR AUTHORITY

APPEAL FROM COURT OF APPEALS OF NEW YORK

No. 84–2030. Argued March 3, 1986—Decided June 3, 1986

New York's Alcoholic Beverage Control Law (ABC Law) provides that a distiller, licensed to do business in the State, may not sell its products to wholesalers within the State except in accordance with a monthly price schedule previously filed with appellee State Liquor Authority, and requires that the distiller include with the schedule an affirmation that the prices in the schedule are no higher than the lowest prices that the distiller will charge wholesalers anywhere else in the United States during the month. Appellee determined that the ABC Law prohibited appellant distiller, which sells its liquor in New York and in other States, from offering certain promotional allowances (based on past purchases and projections of future purchases) to wholesalers in the State, and that the payment of the allowances to wholesalers in other States lowered the "effective price" of appellant's products to those wholesalers, thus violating the affirmation provision of the ABC Law. After license revocation proceedings were instituted against appellant, it sought review of appellee's ruling in the Appellate Division of the New York Supreme Court, which held, *inter alia*, that the affirmation provision did not on its face directly regulate interstate commerce in violation of the Commerce Clause of the Federal Constitution. The New York Court of Appeals affirmed.

Held:

1. The affirmation provision of New York's ABC Law, on its face, violates the Commerce Clause. Pp. 578–585.

(a) In analyzing state economic regulation under the Commerce Clause, the critical consideration is the overall effect of the state law on both local and interstate activity. Pp. 578–579.

(b) While a State, as here, may seek lower prices for its consumers, it may not insist that producers or consumers in other States surrender whatever competitive advantages they may possess. *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511. Economic protectionism is not limited to attempts to convey advantages on local merchants; it may include attempts to give local consumers an advantage over consumers in other States. The mere fact that the effects of New York's ABC Law are triggered only by sales of liquor within New York therefore does not validate the law if it regulates the out-of-state transactions of distillers who sell in New York. Pp. 579–580.

(c) A "prospective" statute such as the affirmation provision of the ABC Law—requiring that prices in the State in the current month not be higher than those that will be charged in any other State during the same (as opposed to the *previous*) month—directly regulates out-of-state transactions in violation of the Commerce Clause. Once a distiller's posted price is in effect in New York, it must seek appellee's approval before it may lower its prices for the same item in other States. By defining the "effective price" of liquor (in view of appellant's promotional allowance program) differently from other States, New York can effectively force appellant to abandon its allowance program in States in which that program is legal, or force those other States to alter their own regulatory schemes in order to permit appellant to lower its New York prices without violating the affirmation laws of those States. Pp. 582–584.

2. The Twenty-first Amendment does not save the ABC Law's affirmative provision from invalidation under the Commerce Clause. That Amendment gives New York only the authority to control sales of liquor in New York, and confers no authority to control sales in other States. The Commerce Clause operates with full force whenever one State attempts to regulate the sale of alcoholic beverages in another State. Moreover, New York's affirmation provision may interfere with the ability of other States to exercise their own authority under the Twenty-first Amendment. Pp. 584–585.

64 N. Y. 2d 479, 479 N. E. 2d 764, reversed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL and O'CONNOR, JJ., joined, and in all but n. 6 of which BLACKMUN, J., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 586. STEVENS, J., filed a dissenting opinion, in which WHITE and REHNQUIST, JJ., joined, *post*, p. 586. BRENNAN, J., took no part in the consideration or decision of the case.

Macdonald Flinn argued the cause and filed briefs for appellant.

Lloyd Constantine, Assistant Attorney General of New York, argued the cause for appellee. With him on the brief were *Robert Abrams*, Attorney General, *Robert Hermann*, Solicitor General, and *August L. Fietkau*, *Richard G.*

Liskov, and *Christopher Keith Hall*, Assistant Attorneys General.*

JUSTICE MARSHALL delivered the opinion of the Court.

The State of New York requires every liquor distiller or producer that sells liquor to wholesalers within the State to sell at a price that is no higher than the lowest price the distiller charges wholesalers anywhere else in the United States. The issue in this case is whether that requirement violates the Commerce Clause of the Constitution.

I

New York extensively regulates the sale and distribution of alcoholic beverages within its borders. The State's Alcoholic Beverage Control Law (ABC Law) prohibits the manufacture and sale of alcoholic beverages within the State without the appropriate licenses, ABC Law § 100(1) (McKinney 1970), and regulates the terms of all sales, §§ 101–a to 101–bbb (McKinney 1970 and Supp. 1986). Distillers and their agents may not sell to wholesalers in New York except in accordance with a price schedule filed with the State Liquor Authority. § 101–b(3)(a). The distiller or agent must file the price schedule before the 25th day of each month, and the prices therein become effective on the first day of the second following month. The schedule must contain a precise description of each item the distiller intends to sell, and a per-bottle and per-case price. All sales to any wholesaler in

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*Briefs of *amici curiae* urging reversal were filed for the Distilled Spirits Council of the United States, Inc., by *David W. Ichel* and *Russell W. Shannon;* for the Distillers Somerset Group Inc. by *Bartlett H. McGuire* and *James D. Liss;* for the United States Brewers Association, Inc., et al. by *Jeffrey Ives Glekel*, *Timothy G. Reynolds*, *Lawrence J. Block*, *Jerome I. Chapman*, and *William H. Allen;* and for the Wine Institute by *Arnold M. Lerman*, *Daniel Marcus*, and *Roy T. Englert, Jr.*

Briefs of *amici curiae* urging affirmance were filed for the National Conference of State Legislatures et al. by *Benna Ruth Solomon;* and for Wine and Spirits Wholesalers of America, Inc., by *Michael Whiteman*, *Douglas W. Metz*, and *Abraham Tunick*.

New York during the month for which the schedule is in effect must be at those prices.

This litigation concerns § 101–b(3)(d) of the ABC Law, which requires any distiller or agent that files a schedule of prices to include an affirmation that "the bottle and case price of liquor to wholesalers set forth in such schedule is no higher than the lowest price at which such item of liquor will be sold by such [distiller] to any wholesaler anywhere in any other state of the United States or in the District of Columbia, or to any state (or state agency) which owns and operates retail liquor stores" during the month covered by the schedule. Violation of the statute may lead to revocation of a distiller's license and the forfeiture of bond posted by the distiller in connection with the license, § 101–b(6). Twenty other States have similar affirmation laws.[1]

Appellant Brown-Forman Distillers Corp. (Brown-Forman) is a distiller that owns several brands of liquor that it sells in New York and in other States. Beginning in 1978, appellant has offered its wholesalers cash payments, or "promotional allowances," which are credited against any amounts due appellant.[2] Appellant intends for wholesalers to use these allowances for advertising; however, the amount of the allowance a wholesaler receives is not tied to the quantity either of the wholesaler's advertising or of its purchases of appellant's products. The amount of a particular wholesaler's allowance does depend on its past purchases and projections of future purchases, but accepting the allowance does not constitute an agreement to purchase any particular quantity of Brown-Forman products. The allowances, therefore, are unconditional, lump-sum payments to all wholesalers, in every State except New York, that purchase Brown-Forman brands.

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[1] These States differ in the time reference for the affirmation price. Some require the distiller to set a price that is no higher than the lowest price charged *previously* anywhere in the United States, see, *e. g.*, Ariz. Rev. Stat. Ann. § 4–253(A) (Supp. 1985). Others, like New York, require the affirmed price to be no higher than the lowest price that will be charged during the *current* month. See ABC Law § 101–b(3)(d).

There are 18 States, known as "control" States, that purchase all liquor that will be distributed and consumed within their borders. The control States use a standard sales contract that requires the distiller to warrant that the price the distiller charges to the State is no higher than the lowest price offered anywhere else in the United States. See Brief for Appellant 5, n. 4.

[2] The Federal Bureau of Alcohol, Tobacco and Firearms (BATF), upon appellant's request, ruled that appellant's promotional allowance does not violate the Federal Alcohol Administration Act, 27 U. S. C. §§ 201–211. See § 205(b) (prohibiting "paying or crediting [any] retailer [of alcoholic beverages] for any advertising" if done to induce the retailer to purchase

Appellant offered the promotional allowance to its New York wholesalers, but the Liquor Authority determined that the ABC Law prohibited such payments.[3] The Authority also determined, however, that the payment of promotional allowances to wholesalers in other States lowered the effective price of Brown-Forman brands to those wholesalers, and thus violated § 101–b(3)(d) of the ABC Law.[4] The Liquor Authority accordingly instituted license revocation proceedings against appellant.

Appellant sought review of the Liquor Authority's ruling in the state courts, asserting that it was both arbitrary and unconstitutional. Appellant contended that it could not possibly file a schedule of prices that reflected precisely the "effective price" charged to wholesalers in other States, because there was no one "effective price." Each participating

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alcohol from the person providing such payment or credit to the exclusion in whole or in part of other distillers or producers). Some of the features of appellant's promotional allowance program described herein were required by BATF in order to ensure that the program would not violate the Act. See Juris. Statement 4.

[3] See § 101–b(2)(b) (prohibiting "any discount, rebate, free goods, allowance or other inducement of any kind whatsoever" except for quantity and prompt-payment discounts of specified amounts).

[4] See § 101–b(3)(g) (in determining lowest price, "appropriate reductions shall be made to reflect all discounts . . . and all rebates, free goods, allowances and other inducements").

wholesaler could pay a different effective price in a given month depending on the amount of Brown-Forman product it had purchased during that month. Moreover, appellant argued, other States did not treat the promotional allowances as discounts. Were New York to force appellant to reduce its prices in that State, appellant would be charging a lower price to New York wholesalers than the price recognized by other States, thereby forcing appellant to violate the affirmation laws of those States. Appellant contended that the only way to avoid this dilemma was to stop offering promotional allowances, unless other States chose to alter their affirmation laws. By effectively forcing appellant to discontinue a promotional program in other States where that program was legal, appellant argued, New York's regulation violated the Commerce Clause. Appellant also argued that the affirmation law on its face directly regulated interstate commerce in violation of the Commerce Clause.

The Appellate Division of the New York Supreme Court rejected these arguments, 100 App. Div. 2d 55, 473 N. Y. S. 2d 420 (1984), as did the New York Court of Appeals, 64 N. Y. 2d 479, 479 N. E. 2d 764 (1985). The Court of Appeals concluded, first, that the Liquor Authority's decision to consider the promotional allowances as a discount was supported by substantial evidence. Second, the court held that the ABC Law as applied does not violate the Commerce Clause, rejecting as speculative appellant's contention that it cannot comply simultaneously with the affirmation laws of New York and of other States. Finally, the court held that the affirmation law, on its face, does not violate the Commerce Clause. We noted probable jurisdiction limited to the question whether the ABC Law, on its face, violates the Commerce Clause, 474 U. S. 814 (1985). We now reverse.

II

This Court has adopted what amounts to a two-tiered approach to analyzing state economic regulation under the

Commerce Clause. When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. See, *e. g.*, *Philadelphia* v. *New Jersey*, 437 U. S. 617 (1978); *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189 (1925); *Edgar* v. *MITE Corp.*, 457 U. S. 624, 640–643 (1982) (plurality opinion). When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970). We have also recognized that there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike* v. *Bruce Church* balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity. See *Raymond Motor Transportation, Inc.* v. *Rice*, 434 U. S. 429, 440–441 (1978).

A

Appellant does not dispute that New York's affirmation law regulates all distillers of intoxicating liquors evenhandedly, or that the State's asserted interest—to assure the lowest possible prices for its residents—is legitimate. Appellant contends that these factors are irrelevant, however, because the lowest-price affirmation provision of the ABC Law falls within that category of direct regulations of interstate commerce that the Commerce Clause wholly forbids. This is so, appellant contends, because the ABC Law effectively regulates the price at which liquor is sold in other States. By requiring distillers to affirm that they will make no sales anywhere in the United States at a price lower than the posted price in New York, appellant argues, New York makes it illegal for a distiller to reduce its price in other States during the period that the posted New York price is in effect. Appellant contends that this constitutes direct regulation of interstate commerce. The law also disadvantages consumers in other States, according to appellant, and is therefore the sort of "simple economic protectionism" that this Court has routinely forbidden. *Philadelphia* v. *New Jersey*, *supra*, at 624.

If appellant has correctly characterized the effect of the New York lowest-price affirmation law, that law violates the Commerce Clause. While a State may seek lower prices for its consumers, it may not insist that producers or consumers in other States surrender whatever competitive advantages they may possess. *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 528 (1935); *Schwegmann Brothers Giant Super Markets* v. *Louisiana Milk Comm'n*, 365 F. Supp. 1144 (MD La. 1973), aff'd, 416 U. S. 922 (1974). Economic protectionism is not limited to attempts to convey advantages on local merchants; it may include attempts to give local consumers an advantage over consumers in other States. See, *e. g.*, *New England Power Co.* v. *New Hampshire*, 455 U. S. 331, 338 (1982) (State may not require "that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders"). In *Seelig*, *supra*, this Court struck down New York's Milk Control Act. The Act set minimum prices for milk purchased from producers in New York and in other States, and banned the resale within New York of milk that had been purchased for a lower price. Justice Cardozo's opinion for the Court recognized that a State may not "establish a wage scale or a scale of prices for use in other states, and . . . bar the sale of the products . . . unless the scale has been observed." *Id.*, at 528. The mere fact that the effects of New York's ABC Law are triggered only by sales of liquor within the State of New York therefore does not validate the law if it regulates the out-of-state transactions of distillers who sell in-state. Our inquiry, then, must center on whether New York's affirmation law regulates commerce in other States.

B

This Court has once before examined the extraterritorial effects of a New York affirmation statute. In *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U. S. 35 (1966), the Court considered the constitutionality, under the Commerce and Supremacy Clauses, of the predecessor to New York's current affirmation law. That law differed from the present version in that it required the distiller to affirm that its prices during a given month in New York would be no higher than the lowest price at which the item had been sold elsewhere during the *previous* month. The Court recognized in that case, as we have here, that the most important issue was whether the statute regulated out-of-state transactions. *Id.*, at 42–43. It concluded, however, that "[t]he mere fact that [the statute] is geared to appellants' pricing policies in other States is not sufficient to invalidate the statute." The Court distinguished *Seelig*, *supra*, by concluding that any effects of New York's ABC Law on a distiller's pricing policies in other States were "largely matters of conjecture," 384 U. S., at 42–43.

Appellant relies on *United States Brewers Assn.* v. *Healy*, 692 F. 2d 275 (CA2 1982), summarily aff'd, 464 U. S. 909 (1983), in seeking to distinguish the present case from *Seagram*. In *Healy*, the Court of Appeals for the Second Circuit considered a Connecticut price-affirmation statute for beer sales that is not materially different from the current New York ABC Law. The Connecticut statute, like the ABC Law, required sellers to post prices at the beginning of a month, and proscribed deviation from the posted prices during that month. The statute also required brewers to affirm that their prices in Connecticut were as low as the price at which they would sell beer in any bordering State during the effective month of the posted prices. The Court of Appeals distinguished *Seagram* based on the "prospective" nature of this affirmation requirement. It concluded that the Connecticut statute made it impossible for a brewer to lower its price in a bordering State in response to market conditions so long as it had a higher posted price in effect in Connecticut. By so doing, the statute "regulate[d] conduct occurring wholly outside the state," 692 F. 2d, at 279, and thereby violated the Commerce Clause. We affirmed summarily.

C

We agree with appellant and with the *Healy* court that a "prospective" statute such as Connecticut's beer affirmation statute, or New York's liquor affirmation statute, regulates out-of-state transactions in violation of the Commerce Clause. Once a distiller has posted prices in New York, it is not free to change its prices elsewhere in the United States during the relevant month.[5] Forcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce. *Edgar* v. *MITE Corp.*, 457 U. S., at 642 (plurality opinion); see also *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S., at 522 (regulation tending to "mitigate the consequences of competition between the states" constitutes direct regulation). While New York may regulate the sale of liquor within its borders, and may seek low prices for its residents, it may not

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[5] The Liquor Authority may "for good cause shown" permit a distiller to change its prices during a particular month, ABC Law § 101–b(3)(a), and New York speculates that the Authority would permit a distiller to lower its prices in other States in a given month so long as the distiller also lowers them in New York. However, whether to permit such a deviation from the statutory scheme is a matter left by the statute to the discretion of the Liquor Authority.

We would not solve the constitutional problems inherent in New York's statute by indulging the dissent's assumption that the Authority will be sensitive to Commerce Clause concerns. Certainly New York could not require an out-of-state company to receive a license from New York to do business in other States, even if we were quite sure that such licenses would be granted as a matter of course. Similarly, New York simply may not force appellant to seek regulatory approval from New York before it can reduce its prices in another State. The protections afforded by the Commerce Clause cannot be made to depend on the good grace of a state agency.

"project its legislation into [other States] by regulating the price to be paid" for liquor in those States. *Id.*, at 521.

That the ABC Law is addressed only to sales of liquor in New York is irrelevant if the "practical effect" of the law is to control liquor prices in other States. *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761, 775 (1945). We cannot agree with New York that the practical effects of the affirmation law are speculative. It is undisputed that once a distiller's posted price is in effect in New York, it must seek the approval of the New York State Liquor Authority before it may lower its price for the same item in other States. It is not at all counterintuitive, as the dissent maintains, *post*, at 588, to assume that the Liquor Authority would not permit appellant to reduce its New York price after the posted price has taken effect. The stated purpose of the prohibition on price changes during a given month is to prevent price discrimination among retailers, see ABC Law §§ 101–b(1), (2)(a). That goal is in direct conflict with the dissent's view of the "whole purpose" of the ABC Law, and we have no means of predicting how the Authority would resolve that conflict. We do know, however, that the Liquor Authority forbade appellant to reduce its New York prices by offering promotional allowances to New York retailers, precisely because the Authority believed that program would violate the price-discrimination provisions. App. to Juris. Statement 50a. The dissent would require us to assume that other States will adopt a flexible approach to appellant's promotional allowance program, *post*, at 589, despite New York's refusal to do so.

Moreover, the proliferation of state affirmation laws following this Court's decision in *Seagram* has greatly multiplied the likelihood that a seller will be subjected to inconsistent obligations in different States. The ease with which New York's lowest-price regulation can interfere with a distiller's operations in other States is aptly demonstrated by the controversy that gave rise to this lawsuit. By defining the "effective price" of liquor differently from other States, New York can effectively force appellant to abandon its promotional allowance program in States in which that program is legal, or force those other States to alter their own regulatory schemes in order to permit appellant to lower its New York prices without violating the affirmation laws of those States. Thus New York has "project[ed] its legislation" into other States, and directly regulated commerce therein, in violation of *Seelig, supra.*[6]

III

New York finally contends that the Twenty-first Amendment, which bans the importation or possession of intoxicating liquors into a State "in violation of the laws thereof," saves the ABC Law from invalidation under the Commerce Clause. That Amendment gives the States wide latitude to regulate the importation and distribution of liquor within their territories, *California Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, 107 (1980). Therefore, New York argues, its ABC Law, which regulates the sale of alcoholic beverages within the State, is a valid exercise of the State's authority.

It is well settled that the Twenty-first Amendment did not entirely remove state regulation of alcohol from the reach of the Commerce Clause. See *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263 (1984). Rather, the Twenty-first Amendment and the Commerce Clause "each must be considered in light of the other and in the context of the issues and interests at stake in any concrete case." *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324, 332 (1964). Our task, then, is to reconcile the interests protected by the two constitutional provisions.

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[6] While we hold that New York's prospective price affirmation statute violates the Commerce Clause, we do not necessarily attach constitutional significance to the difference between a prospective statute and the retrospective statute at issue in *Seagram*. Indeed, one could argue that the effects of the statute in *Seagram* do not differ markedly from the effects of the statute at issue in the present case. If there is a conflict between today's decision and the *Seagram* decision, however, there will be time enough to address that conflict should a case arise involving a retrospective statute. Because no such statute is before us now, we need not consider the continuing validity of *Seagram*.

New York has a valid constitutional interest in regulating sales of liquor within the territory of New York. Section 2 of the Twenty-first Amendment, however, speaks only to state regulation of the "transportation or importation into any State . . . for delivery or use therein" of alcoholic beverages. That Amendment, therefore, gives New York only the authority to control sales of liquor in New York, and confers no authority to control sales in other States. The Commerce Clause operates with full force whenever one State attempts to regulate the transportation and sale of alcoholic beverages destined for distribution and consumption in a foreign country, *Idlewild Bon Voyage Liquor Corp.*, *supra*, or another State. Our conclusion that New York has attempted to regulate sales in other States of liquor that will be consumed in other States therefore disposes of the Twenty-first Amendment issue.

Moreover, New York's affirmation law may interfere with the ability of other States to exercise their own authority under the Twenty-first Amendment. Once a distiller has posted prices in New York, it is not free to lower them in another State, even in response to a regulatory directive by that State, without risking forfeiture of its license in New York. New York law, therefore, may force other States either to abandon regulatory goals or to deprive their citizens of the opportunity to purchase brands of liquor that are sold in New York. New York's reliance on the Twenty-first Amendment is therefore misplaced. Having found that the ABC Law on its face violates the Commerce Clause, and is not a valid exercise of New York's powers under the Twenty-first Amendment, we reverse the judgment of the New York Court of Appeals.

It is so ordered.

JUSTICE BRENNAN took no part in the consideration or decision of this case.

JUSTICE BLACKMUN, concurring.

I join the Court's opinion (except for its footnote 6), but I would go further and overrule *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U. S. 35 (1966). *Seagram* is now a relic of the past. It was decided when affirmation statutes were comparatively new and long before the proliferation of overlapping and potentially conflicting affirmation statutes that has taken place in the last two decades. I see no principled distinction that can be drawn for constitutional analysis between New York's current prospective statute and the same State's retroactive statute upheld in *Seagram*, and I doubt very much whether any Member of this Court would be able to perceive one. Either type, despite one's best efforts at fine-tuning, operates to affect out-of-state transactions and violates the Commerce Clause. Our failure to overrule *Seagram* now merely preserves uncertainty and will breed or necessitate further litigation. We should face reality and overrule *Seagram*.

JUSTICE STEVENS, with whom JUSTICE WHITE and JUSTICE REHNQUIST join, dissenting.

Speculation about hypothetical cases illuminates the discussion in a classroom, but it is evidence and historical fact that provide the most illumination in a courtroom. Forgoing the support of a record developed at trial, appellant Brown-Forman Distillers Corporation (Brown-Forman) contends that New York's Alcoholic Beverage Control (ABC) Law § 100 *et seq.* (McKinney 1970 and Supp. 1986) is an unconstitutional burden on interstate commerce "on its face." Over 20 years ago this Court unanimously refused to invalidate the predecessor of New York's present statute on precisely the same ground. As Justice Stewart then explained:

> "The mere fact that § 9 is geared to appellants' pricing policies in other States is not sufficient to invalidate the

> statute. As part of its regulatory scheme for the sale of liquor, New York may constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country. The serious discriminatory effects of § 9 alleged by appellants on their business outside New York are largely matters of conjecture. It is by no means clear, for instance, that § 9 must inevitably produce higher prices in other States, as claimed by appellants, rather than the lower prices sought for New York. It will be time enough to assess the alleged extraterritorial effects of § 9 when a case arises that clearly presents them." *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U. S. 35, 43 (1966).

Two decades have elapsed since those sentences were written. In the interim, Brown-Forman has been selling its products in more than 30 States, including New York. Yet at no time did it introduce any evidence tending to prove that New York's ABC Law affected the price of its products in any other State.[1]

In lieu of evidence about the actual impact of the New York statute, the Court speculates that the ABC Law prevents price competition in transactions involving Brown-Forman's products in other States. See *ante*, at 579–580, 582. This result is not a necessary consequence of the operation of the New York law. To begin with, so far as New York is concerned Brown-Forman may maintain its selling price in other States or may increase it—either is consistent with Brown-Forman's promise to give New York wholesalers its "lowest price." § 101–b(3)(d). Only if Brown-Forman reduces its prices outside of New York would it violate its affirmation. But in that event, the State allows it to extend the same discount to its New York customers "for good cause shown and for reasons not inconsistent with the purpose of this chapter." § 101–b(3)(a).[2] There is nothing in the record to suggest that the State Liquor Authority would ever object to a price *reduction* to conform to a lower out-of-state price, and it is counterintuitive to assume that it would. The whole purpose of the law, after all, is to provide New York consumers with the lowest prices that can be obtained. Consistent with this purpose, the State Liquor Authority has, in a similar situation, "offered to grant approval . . . to offer a cash discount in New York equivalent to the product discounts [the distiller] would offer in other states." *Joseph E. Seagram & Sons, Inc.* v. *Gazzara*, 610 F. Supp. 673, 678, n. 5 (SDNY), appeal docketed, No. 85–7547 (CA2, July 1, 1985). The administrative flexibility demonstrated by the State Liquor Authority thus belies the Court's assumption to the contrary. See *ante*, at 582, n. 5. It also demonstrates the wisdom of the *Seagram* Court's unwillingness to "presume that the Authority will not exercise that discretion to alleviate any friction that might result should the ABC Law chafe against" a provision of the Federal Constitution. *Seagram & Sons, Inc.* v. *Hostetter*, 384 U. S., at 43 (rejecting Supremacy Clause challenge predicated on federal antitrust laws). Cf. *id.*, at 51. The presumption of constitutionality applied in *Seagram* not only accords with tradition—agencies are frequently charged with rectifying questionable applications of necessarily general rules—it is also consistent with the respect due state administrative organs responsible for the operation of a state law whose constitutionality is challenged on its face. Cf. *United States* v. *Vuitch*, 402 U. S. 62, 70 (1971).[3] And if the State Liquor Authority were in fact to allow Brown-Forman to extend discounts given outside the State to its customers in New York, there is no reason to suppose that those other States would in turn refuse to allow Brown-Forman to credit the value of its promotional allowances against its list prices in order to comply with the statutory recording obligations in those States.[4]

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[1] The record does show that Brown-Forman's promotional allowances "effectively lowered the price to wholesalers in Massachusetts below the affirmation price in New York" in a manner "designed to circumvent the New York State Alcoholic Beverage Control Law." App. to Juris. Statement 51a. This evidence, however, surely does not provide any basis for distinguishing this case from the *Seagram* case.

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[2] The Connecticut statute invalidated on its face in *United States Brewers Assn., Inc.* v. *Healy*, 692 F. 2d 275 (CA2 1982), summarily aff'd, 464 U. S. 909 (1983), had no escape clause. See 692 F. 2d, at 276–277, nn. 3, 5, 6, and 7. The Second Circuit panel construed the Connecticut statute "to control the minimum price that may be charged by a non-Connecticut brewer to a non-Connecticut wholesaler in a sale outside of Connecticut." *Id.*, at 282.

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[3] This discussion indulges the Court's unstated assumption that price changes are not preceded by sufficient lead time to comply with the 35-day notice provision of the ABC Law. Again, however, there is nothing in the record to indicate that Brown-Forman has ever found it necessary to make a price change that could not be preceded by sufficient notice. *Amicus curiae* Wine & Spirits Wholesalers of America, Inc., informs us that the 18 States with liquor monopolies "perhaps typically" require suppliers "to warrant that quoted prices will remain in effect for a minimum of 90 days." Brief for Wine and Spirits Wholesalers of America, Inc., as *Amicus Curiae* 9, n. 6. If, as a result of such contracts, prices in this industry are changed quarterly or at other infrequent intervals and are normally preceded by an announcement that the effective date of the change will be two or more months in the future, the statute would not have any inhibiting effect whatsoever on Brown-Forman's pricing decisions.

[4] "In making this argument, appellant assumes, and properly so, that other States will enforce their liquor laws. But appellant also requires us to assume that other States will enforce their laws without regard for reality, and this we are unwilling to do.

". . . It is certainly reasonable to expect that other States will recognize that the prices on appellant's New York schedules have been adjusted, because of New York's statutory requirements, to take into account the effect of credits enjoyed by wholesalers elsewhere—credits which the other States receiving the tangible benefits of appellant's program apparently have already chosen not to consider in determining the affirmed price.

". . . It would require us to engage in mere speculation were we to declare, on such a tenuous basis, the lowest-price affirmation statute

Even if these open questions are all resolved in the Court's favor, its conclusion that the ABC Law trenches on interstate commerce does not follow from *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511 (1935), the authority on which it primarily relies. Decided 30 years before *Seagram*, that case invalidated the New York Milk Control Act on the ground that it was designed to inflate milk prices in order to protect New York producers from out-of-state competition, see 294 U. S., at 519—a classic illustration of economic provincialism.[5] By contrast, the New York ABC Act was designed to keep the prices of liquor down in order to give New York consumers the benefit of out-of-state competition. See 384 U. S., at 38–39, and n. 9. The obvious infirmity of the statute struck down in *Seelig* thus says nothing about the constitutionality of the statute before us.

Moreover, as Judge Friendly observed, "[f]or some of us who were 'present at the creation' of the Twenty-First Amendment, there is an aura of unreality in [the] assumption that we must examine the validity of New York's Alcoholic Beverage Control Law (ABC Law) just as we would examine the constitutionality of a state statute governing the sale of gasoline"—or, I would add, of milk. *Battipaglia* v. *New York State Liquor Authority*, 745 F. 2d 166, 168 (CA2 1984), cert. denied, 470 U. S. 1027 (1985). The statute in *Seelig* regulated an article of commerce that New York had no

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unconstitutional as applied." 64 N. Y. 2d 479, 489–490, 479 N. E. 2d 764, 769–770 (1985) (citations omitted).

Moreover, such possible consequences in States other than New York would seem to provide as good a reason for invalidating those States' laws as it does for striking down New York's statute.

[5] Seelig had purchased milk from Vermont farmers at a competitive price—instead of the New York regulated price—and was therefore denied a license to resell that milk in New York. *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S., at 520. As Justice Cardozo explained, Seelig "may keep his milk or drink it, but sell it he may not." *Id.*, at 521.

power to exclude from the State;[6] the statute challenged here, in contrast, regulates the sale of a product that the Twenty-first Amendment expressly authorizes New York to exclude entirely from its local market.[7] As Justice Stewart explained for a unanimous Court in *Seagram:*

> "Consideration of any state law regulating intoxicating beverages must begin with the Twenty-first Amendment, the second section of which provides that: 'The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.' As this Court has consistently held, 'That Amendment bestowed upon the states broad regulatory power over the liquor traffic within their territories.' *United States* v. *Frankfort Distilleries*, 324 U. S. 293, 299 [1945]. Cf. *Nippert* v. *Richmond*, 327 U. S. 416, 425, n. 15 [1946]. Just two Terms ago we took occasion to reiterate that 'a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.' *Hostetter* v. *Idlewild Liquor Corp.*, 377 U. S. 324, 330 [1964]. See *State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59 [1936]; *Mahoney* v.

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[6] "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there. So much is not disputed. New York is equally without power to prohibit the introduction within her territory of milk of wholesome quality acquired in Vermont, whether at high prices or at low ones. This again is not disputed." *Ibid.*

[7] New York's ABC Law complies with the letter and spirit of the Twenty-first Amendment. The New York law imposes a condition precedent to importation of liquor into the State pursuant to the literal terms of the Amendment, and it does so "for the purpose of fostering and promoting temperance in th[e] consumption [of alcoholic beverages] and respect for and obedience to the law." § 101–b(1). Cf. *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263 (1984).

> *Joseph Triner Corp.*, 304 U. S. 401 [1938]; *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132 [1939]; *California* v. *Washington*, 358 U. S. 64 [1958]. Cf. *Indianapolis Brewing Co.* v. *Liquor Comm'n*, 305 U. S. 391 [1939]; *Joseph S. Finch & Co.* v. *McKittrick*, 305 U. S. 395 [1939]." 384 U. S., at 41–42.[8]

Of more recent vintage, see *Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S. 691, 712–713 (1984); *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, 110 (1980).

It may well be true that the network of statutes that have spread across the Nation since the Court's decision in *Seagram* has created "so grave an interference with" interstate commerce as to exceed the "wide latitude for [state] regulation" under the Twenty-first Amendment and to make "the regulation invalid under the Commerce Clause." 384 U. S., at 42–43. If that be the case, however, there should be ample evidence available to a concerned litigant to prove that this consequence has in fact developed. Until that is done, I believe we have a duty to adhere to the ruling in *Seagram*. Accordingly, I respectfully dissent.

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[8] The Court's Twenty-first Amendment analysis, unsupported by any citation to authority, appears to be at war with itself. I simply cannot understand how the Twenty-first Amendment gives New York *no* right to condition access to *its* market on compliance with a "lowest price" affirmation (because to do so affects liquor sales in other States), and yet at the same time gives other States authority "to purchase brands of liquor that are sold in New York." *Ante*, at 585. By reading the Twenty-first Amendment broadly to encompass any interstate regulation of liquor, but removing the constitutional shield when the faintest economic ripples begin to flow outside state borders, the Court has, at least in the interdependent national liquor market in which Brown-Forman participates, gutted the constitutional provision.

UNITED STATES *v.* HUGHES PROPERTIES, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 85–554. Argued April 23, 1986—Decided June 3, 1986

Respondent, in its gambling casino in Reno, Nev., operated a number of "progressive" slot machines. In addition to paying fixed amounts when certain symbol combinations appear on their reels, these machines have a "progressive" jackpot that is won only when a different specified combination appears. The amount of the jackpot increases as money is gambled on the machine until the jackpot is won. A Nevada Gaming Commission regulation prohibits reducing the indicated payoff without paying the jackpot. Utilizing the accrual method of accounting, respondent's practice was, at the end of each fiscal year, to enter the total of the progressive jackpot amounts as an accrued liability on its books, and from that total to subtract the corresponding figure for the preceding year to produce the current tax year's increase in accrued liability. On its federal income tax returns for certain fiscal years, respondent claimed this net figure as a deduction under § 162(a) of the Internal Revenue Code of 1954, as an ordinary and necessary business expense incurred during the taxable year. The Commissioner of Internal Revenue (Commissioner) disallowed the deductions on the ground that, under Treasury Regulations, an expense may not be deducted until "all the events have occurred which determine the fact of liability and the amount thereof can be determined with reasonable accuracy," and that, until a patron actually won a progressive jackpot, respondent's liability to pay the jackpot was contingent and therefore was not a deductible expense. Accordingly, the Commissioner determined deficiencies in respondent's income taxes for the years in question. Respondent paid the deficiencies, and, when its claims for refunds were denied, brought suit in the Claims Court. The court granted respondent's motion for summary judgment, holding that respondent's liability to pay the progressive jackpots was fixed by the Nevada regulation. The Court of Appeals affirmed.

Held: Respondent was entitled to claim the deductions in question. Pp. 599–606.

(a) The "all events" test prescribed by the Treasury Regulations requires that before an expense can be regarded as "incurred" for federal income tax purposes, a liability must be fixed and absolute. Pp. 600–601.

(b) Here, the effect of the Nevada regulation was to fix respondent's liability. Identification of the winning players is irrelevant to respondent, since the obligation to pay exists and whether it turns out that the winner is one patron or another makes no difference as to liability. The event creating liability was the last play of each progressive slot machine before the end of the fiscal year, since that play fixed the jackpot amount irrevocably. That event occurred during the taxable year. *Brown* v. *Helvering*, 291 U. S. 193, distinguished. Pp. 601–603.

(c) Granting that the Commissioner has broad discretion to determine whether a taxpayer's accounting methods clearly reflect income, that financial accounting does not control for tax purposes, and that the mere desirability of matching expenses with income will not necessarily sustain a taxpayer's deduction, the disallowance of respondent's deductions was not justified. As noted, the jackpot liabilities were fixed, and only the exact times of payment and the winners' identity remained uncertain. Pp. 603–604.

(d) Nothing in the record indicates that respondent used its progressive slot machines for tax-avoidance purposes. Pp. 604–605.

(e) The potential that a casino operator might go out of business, or surrender or lose its license, or go into bankruptcy, with the result that the progressive jackpot would never be paid, does not prevent accrual of the expense. Pp. 605–606.

(f) One of the expenses that necessarily attends the production of income from a progressive slot machine is the commitment of a particular portion of the income generated to an irrevocable jackpot. Cf. *United States* v. *Anderson*, 269 U. S. 422. Respondent's true income from its progressive slot machines is only that portion of the money gambled that it is entitled to keep. P. 606.

760 F. 2d 1292, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 607.

Albert G. Lauber, Jr., argued the cause for the United States. With him on the briefs were *Solicitor General Fried*, *Acting Assistant Attorney General Olsen*, *Richard Farber*, and *William A. Whitledge*.

O. Clayton Lilienstern argued the cause for respondent. With him on the brief was *Denton N. Thomas*.*

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*Briefs of *amici curiae* urging affirmance were filed for the Atlantic City Casino Association by *Herbert J. Miller, Jr.*, and *David O. Stewart;*

JUSTICE BLACKMUN delivered the opinion of the Court.

This case concerns the deductibility for federal income tax purposes, by a casino operator utilizing the accrual method of accounting, of amounts guaranteed for payment on "progressive" slot machines but not yet won by playing patrons.

I

A

There is no dispute as to the relevant facts; many of them are stipulated. Respondent Hughes Properties, Inc., is a Nevada corporation. It owns Harolds Club, a gambling casino, in Reno, Nev. It keeps its books and files its federal income tax returns under the accrual method of accounting. During the tax years in question (the fiscal years that ended June 30 in 1973 to 1977, inclusive), respondent owned and operated slot machines at its casino. Among these were a number of what are called "progressive" machines. A progressive machine, like a regular one, pays fixed amounts when certain symbol combinations appear on its reels. But a progressive machine has an additional "progressive" jackpot, which is won only when a different specified combination appears. The casino sets this jackpot initially at a minimal amount. The figure increases, according to a ratio determined by the casino, as money is gambled on the machine. The amount of the jackpot at any given time is registered on a "payoff indicator" on the face of the machine. That amount continues to increase as patrons play the machine until the jackpot is won or until a maximum, also determined by the casino, is reached.

The odds of winning a progressive jackpot obviously are a function of the number of reels on the machine, the number of positions on each reel, and the number of winning symbols. The odds are determined by the casino, provided only that

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for New York Life Insurance Co. by *Matthew J. Zinn* and *J. Walker Johnson;* and for Transamerica Corp. by *W. Reece Bader* and *Cameron W. Wolfe, Jr.*

there exists a possibility that the winning combination of symbols can appear.[1]

The Nevada Gaming Commission closely regulates the casino industry in the State, including the operation of progressive slot machines. In September 1972, the Commission promulgated § 5.110 of the Nevada Gaming Regulations. See App. 55. This section requires a gaming establishment to record at least once a day the jackpot amount registered on each progressive machine. § 5.110.5. Furthermore,

> "[n]o payoff indicator shall be turned back to a lesser amount, unless the amount by which the indicator has been turned back is actually paid to a winning player, or unless the change in the indicator reading is necessitated through a machine malfunction, in which case an explanation must be entered on the daily report as required in subsection 5." § 5.110.2; App. 55.

The regulation is strictly enforced. Nevada, by statute, authorizes the Commission to impose severe administrative sanctions, including license revocation, upon any casino that wrongfully refuses to pay a winning customer a guaranteed jackpot. See Nev. Rev. Stat. § 463.310 (1985).

It is respondent's practice to remove the money deposited by customers in its progressive machines at least twice every week and also on the last day of each month. The Commission does not regulate respondent's use of the funds thus collected, but, since 1977, it has required that a casino maintain a cash reserve sufficient to provide payment of the guaranteed amounts on all its progressive machines available to the public. Nev. Gaming Regs. § 5.110(3); App. 56.

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[1] A 1976 study of the 24 four-reel progressive machines then in operation at respondent's casino revealed that the average period between payoffs was approximately 4½ months, although one machine had been in operation for 13 months and another for 35 months without a payoff as of September 1, 1976. The payoff frequency of the other 22 machines ranged from a high of 14.3 months to a low of 1.9 months.

B

At the conclusion of each fiscal year, that is, at midnight on June 30, respondent entered the total of the progressive jackpot amounts shown on the payoff indicators as an accrued liability on its books. From that total, it subtracted the corresponding figure for the preceding year to produce the current tax year's increase in accrued liability. On its federal income tax return for each of its fiscal years 1973, 1974, 1975, and 1977, respondent asserted this net figure as a deduction under § 162(a) of the Internal Revenue Code of 1954, as amended, 26 U. S. C. § 162(a), as an ordinary and necessary expense "paid or incurred during the taxable year in carrying on any trade or business."[2] There is no dispute as to the amounts so determined or that a progressive jackpot qualifies for deduction as a proper expense of running a gambling business. See Tr. of Oral Arg. 7.

On audit, the Commissioner of Internal Revenue disallowed the deduction. He did so on the ground that, under Treas. Reg. § 1.461–1(a)(2), 26 CFR § 1.461–1(a)(2) (1985), an expense may not be deducted until "all the events have occurred which determine the fact of the liability and the amount thereof can be determined with reasonable accuracy." In his view, respondent's obligation to pay a particular progressive jackpot matures only upon a winning patron's pull of the handle in the future. According to the Commissioner, until that event occurs, respondent's liability to pay the jackpot is contingent and therefore gives rise to no deductible expense. Indeed, until then, there is no one who can make a claim for payment. See Tr. of Oral Arg. 11. Accordingly, the Commissioner determined deficiencies in respondent's income taxes for the years in question in the total amount of $433,441.88, attributable solely to the denial of these progressive jackpot deductions. Respondent paid the asserted deficiencies and filed timely claims for refund. When the claims were denied, respondent brought this suit for refunds in the Claims Court.

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[2] No deduction was asserted for fiscal 1976 because the aggregate accrued liability at the end of fiscal 1976 was less than that at the end of fiscal 1975.

C

Each side moved for summary judgment. App. 15, 52. Respondent contended that the year-end amounts shown on the payoff indicators of the progressive slot machines were deductible, claiming that there was a reasonable expectation that payment would be made at some future date, that the casino's liability was fixed and irrevocable under Nevada law, that the accrual of those amounts conformed with generally accepted accounting principles, and that deductibility effected a timely and realistic matching of revenue and expenses.

The Claims Court denied the Government's motion for summary judgment but granted respondent's motion. 5 Cl. Ct. 641 (1984). It concluded that, under the Nevada Commission's rule, respondent's liability to pay the amounts on the progressive jackpot indicators became "unconditionally fixed," *id.*, at 645, at "midnight of the last day of the fiscal year," *id.*, at 647. The final event was "the last play (successful or not) of the machine before the close of the fiscal year, that is, the last change in the jackpot amount before the amount is recorded for accounting purposes." *Id.*, at 645. A contrary result would mismatch respondent's income and expenses. The court acknowledged that, if respondent were to go out of business, it would not owe the jackpot amount to any particular person. *Id.*, at 646. Nevertheless, the jackpot indicator amount "would still continue to be an *incurred* liability fixed by state law, for which [respondent] would continue to be responsible" (emphasis in original). *Id.*, at 645.

The Claims Court further acknowledged that its ruling was in conflict with the decision of the Court of Appeals for the Ninth Circuit in *Nightingale* v. *United States*, 684 F. 2d 611 (1982), having to do with another Nevada casino, but it declined to follow that precedent and specifically disavowed its reasoning. 5 Cl. Ct., at 644–647.

The Court of Appeals for the Federal Circuit affirmed the judgment "on the basis of the United States Claims Court opinion." 760 F. 2d 1292, 1293 (1985). It ruled that, under the accrual method of accounting, an expense is deductible in the tax year in which all the events have occurred that determine the fact of liability and the amount thereof can be determined with reasonable accuracy, and that liability exists "if there is an obligation to perform an act and the cost of performance can be measured in money." *Ibid.* The liability here was not contingent upon the time of payment or the identity of the jackpot winner. Rather, it was fixed by the Commission's regulation. The "contrary conclusion" of the Ninth Circuit in *Nightingale* was noted. 760 F. 2d, at 1293.

Because of the clear conflict between the two Circuits, we granted certiorari. 474 U. S. 1004 (1985).

II

Section 162(a) of the Internal Revenue Code allows a deduction for "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." Section 446(a) provides that taxable income "shall be computed under the method of accounting on the basis of which the taxpayer regularly computes his income in keeping his books." Under the "cash receipts and disbursements method," specifically recognized by § 446(c)(1), a taxpayer is entitled to deduct business expenses only in the year in which they are paid. Treas. Reg. §§ 1.446–1(c)(1)(i) and 1.461–1(a)(1), 26 CFR §§ 1.446–1(c)(1)(i), 1.461–1(a)(1) (1985). The Code also permits a taxpayer to compute taxable income by the employment of "an accrual method." § 446(c)(2). An accrual-method taxpayer is entitled to deduct an expense in the year in which it is "incurred," § 162(a), regardless of when it is actually paid.

For a number of years, the standard for determining when an expense is to be regarded as "incurred" for federal income tax purposes has been the "all events" test prescribed by the Regulations. See Treas. Reg. § 1.446–1(c)(1)(ii) (accruals in general); § 1.451–1(a) (accrual of income); and § 1.461–1(a)(2) (accrual of deductions). This test appears to have had its origin in a single phrase that appears in this Court's opinion in *United States* v. *Anderson*, 269 U. S. 422, 441 (1926) ("[I]t is also true that in advance of the assessment of a tax, all the events may occur which fix the amount of the tax and determine the liability of the taxpayer to pay it"). Since then, the Court has described the "all events" test "established" in *Anderson* as "the 'touchstone' for determining the year in which an item of deduction accrues," and as "a fundamental principle of tax accounting." *United States* v. *Consolidated Edison Co. of New York*, 366 U. S. 380, 385 (1961) (citing cases).

Under the Regulations, the "all events" test has two elements, each of which must be satisfied before accrual of an expense is proper. First, all the events must have occurred which establish the fact of the liability. Second, the amount must be capable of being determined "with reasonable accuracy." Treas. Reg. § 1.446–1(c)(1)(ii). This case concerns only the first element, since the parties agree that the second is fully satisfied.

III

The Court's cases have emphasized that "a liability does not accrue as long as it remains contingent." *Brown* v. *Helvering*, 291 U. S. 193, 200 (1934); accord, *Dixie Pine Products Co.* v. *Commissioner*, 320 U. S. 516, 519 (1944). Thus, to satisfy the all-events test, a liability must be "final and definite in amount," *Security Flour Mills Co.* v. *Commissioner*, 321 U. S. 281, 287 (1944), must be "fixed and absolute," *Brown* v. *Helvering*, 291 U. S., at 201, and must be "unconditional," *Lucas* v. *North Texas Lumber Co.*, 281 U. S. 11, 13 (1930). And one may say that "the tax law requires that a deduction be deferred until 'all the events' have occurred that will make it fixed and certain." *Thor Power Tool Co.* v. *Commissioner*, 439 U. S. 522, 543 (1979).

A

The Government argues that respondent's liability for the progressive jackpots was not "fixed and certain," and was not "unconditional" or "absolute," by the end of the fiscal year, for there existed no person who could assert any claim to those funds. It takes the position, quoting *Nightingale* v. *United States*, 684 F. 2d, at 614, that the indispensable event "is the winning of the progressive jackpot by some fortunate gambler." It says that, because respondent's progressive jackpots had not been won at the close of the fiscal year, respondent had not yet incurred liability. Nevada law places no restriction on the odds set by the casino, as long as a possibility exists that the winning combination can appear. Thus, according to the Government, by setting very high odds respondent can defer indefinitely into the future the time when it actually will have to pay off the jackpot. The Government argues that if a casino were to close its doors and go out of business, it would not owe the jackpots to anyone. Similarly, if it were to sell its business, or cease its gaming operations, or go into bankruptcy, or if patrons were to stop playing its slot machines, it would have no obligation.

B

We agree with the Claims Court and with the Federal Circuit and disagree with the Government for the following reasons:

1. The effect of the Nevada Gaming Commission's regulations was to fix respondent's liability. Section 5.110.2 forbade reducing the indicated payoff without paying the jackpot, except to correct a malfunction or to prevent exceeding the limit imposed. App. 55. Respondent's liability, that is, its obligation to pay the indicated amount, was not contingent. That an extremely remote and speculative possibility

existed that the jackpot might never be won,[3] did not change the fact that, as a matter of state law, respondent had a fixed liability for the jackpot which it could not escape. The effect of Nevada's law was equivalent to the situation where state law requires the amounts of the jackpot indicators to be set aside in escrow pending the ascertainment of the identity of the winners. The Government concedes that, in the latter case, the liability has accrued, Tr. of Oral Arg. 20–21, even though the same possibility would still exist that the winning pull would never occur.

2. The Government misstates the need for identification of the winning player. That is, or should be, a matter of no relevance for the casino operator. The obligation is there, and whether it turns out that the winner is one patron or another makes no conceivable difference as to basic liability.

3. The Government's heavy reliance on *Brown* v. *Helvering*, 291 U. S. 193 (1934), in our view, is misplaced. That case concerned an agent's commissions on sales of insurance policies, and the agent's obligation to return a proportionate part of the commission in case a policy was canceled. The agent sought to deduct from gross income an amount added during the year to his reserve for repayment of commissions. This Court agreed with the Commissioner's disallowance of the claimed deduction because the actual event that would create the liability—the cancellation of a particular policy in a later year—"[did] not occur during the taxable year," *id.*, at 200, but rather occurred only in the later year in which the policy was in fact canceled. Here, however, the event creating liability, as the Claims Court recognized, was the last play of the machine before the end of the fiscal year,

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[3] An affidavit of the president of respondent's Harolds Club Division, submitted in the Claims Court in support of respondent's motion for summary judgment, states that all the progressive machine jackpots unpaid as of June 30, 1977, "were subsequently won and paid to customers." App. 62.

since that play fixed the jackpot amount irrevocably. 5 Cl. Ct., at 645. That event occurred during the taxable year.

4. The Government's argument that the fact that respondent treats unpaid jackpots as liabilities for financial accounting purposes does not justify treating them as liabilities for tax purposes is unpersuasive. Proper financial accounting and acceptable tax accounting, to be sure, are not the same. Justice Brandeis announced this fact well over 50 years ago: "The prudent business man often sets up reserves to cover contingent liabilities. But they are not allowable as deductions." *Lucas* v. *American Code Co.*, 280 U. S. 445, 452 (1930). See also *Brown* v. *Helvering*, 291 U. S., at 201–202, and *Lucas* v. *Kansas City Structural Steel Co.*, 281 U. S. 264, 269 (1930). The Court has long recognized "the vastly different objectives that financial and tax accounting have." *Thor Power Tool Co.* v. *Commissioner*, 439 U. S., at 542. The goal of financial accounting is to provide useful and pertinent information to management, shareholders, and creditors. On the other hand, the major responsibility of the Internal Revenue Service is to protect the public fisc. *Ibid.* Therefore, although § 446(c)(2) permits a taxpayer to use an accrual method for tax purposes if he uses that method to keep his books, § 446(b) specifically provides that if the taxpayer's method of accounting "does not clearly reflect income," the Commissioner may impose a method that "does clearly reflect income." Thus, the "Commissioner has broad powers in determining whether accounting methods used by a taxpayer clearly reflect income." *Commissioner* v. *Hansen*, 360 U. S. 446, 467 (1959). See also *Thor Power Tool Co.* v. *Commissioner*, 439 U. S., at 532; *American Automobile Assn.* v. *United States*, 367 U. S. 687, 697–698 (1961). The Regulations carry this down specifically to "the accounting treatment of any item." Treas. Reg. § 1.446–1(a)(1).

Granting all this—that the Commissioner has broad discretion, that financial accounting does not control for tax purposes, and that the mere desirability of matching expenses with income will not necessarily sustain a taxpayer's deduction, see *American Automobile Assn.* v. *United States*, 367 U. S., at 690; *Thor Power Tool Co.* v. *Commissioner*, 439 U. S., at 541—the Commissioner's disallowance of respondent's deductions was not justified in this case. As stated above, these jackpot liabilities were definitely fixed. A part of the machine's intake was to be paid out, that amount was known, and only the exact time of payment and the identity of the winner remained for the future. But the accrual method itself makes irrelevant the timing factor that controls when a taxpayer uses the cash receipts and disbursements method.[4]

5. The Government suggests that respondent's ability to control the timing of payouts shows both the contingent nature of the claimed deductions and a potential for tax avoidance. It speaks of the time value of money, of respondent's ability to earn additional income upon the jackpot amounts it retains until a winner comes along, of respondent's "virtually unrestricted discretion in setting odds," Brief for United States 31, and of its ability to transfer amounts from one machine to another with the accompanying capacity to defer indefinitely into the future the time at which it must make payment to its customers. All this, the Government says, unquestionably contains the "potential for tax avoidance." See *Thor Power Tool Co.* v. *Commissioner*, 439 U. S., at 538. And the Government suggests that a casino operator could put extra machines on the floor on the last day of the tax year with whatever initial jackpots it specifies and with whatever odds it likes, and then, on the taxpayer's theory,

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[4] The fact that Congress once briefly adopted statutory provisions that specifically would have permitted a taxpayer to deduct anticipated expenses by a reserve mechanism is hardly significant. See §§ 462(a) and (d)(1)(B) of the 1954 Code as originally adopted, 68A Stat. 158–159, repealed retroactively by the Act of June 15, 1955, ch. 143, §§ 1 and 3, 69 Stat. 134, 135. But see Deficit Reduction Act of 1984, § 91(a), 98 Stat. 598.

could take a current deduction for the full amount even though payment of the jackpots might not occur for many years, citing *Nightingale*, 684 F. 2d, at 615.

None of the components that make up this parade of horribles, of course, took place here. Nothing in this record even intimates that respondent used its progressive machines for tax-avoidance purposes. Its income from these machines was less than 1% of its gross revenue during the tax years in question. See App. 35–36. Respondent's revenue from progressive slot machines depends on inducing gamblers to play the machines, and, if it sets unreasonably high odds, customers will refuse to play and will gamble elsewhere. Thus, respondent's economic self-interest will keep it from setting odds likely to defer payoffs too far into the future.[5] Nor, with Nevada's strictly imposed controls, was any abuse of the kind hypothesized by the Government likely to happen. In any event, the Commissioner's ability, under § 446(b) of the Code, 26 U. S. C. § 446(b), to correct any such abuse is the complete practical answer to the Government's concern. If a casino manipulates its use of progressive slot machines to avoid taxes, the Commissioner has the power to find that its accounting does not accurately reflect its income and to require it to use a more appropriate accounting method. Finally, since the casino of course must pay taxes on the income it earns from the use of as-yet-unwon jackpots, the Government vastly overestimates the time value of respondent's deductions.

6. There is always a possibility, of course, that a casino may go out of business, or surrender or lose its license, or go

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[5] Respondent also is unlikely to set extremely high initial jackpots on its machines, since that practice would increase the casino's risk. The initial progressive jackpot amount is the casino's money. If a patron gets the winning combination soon after the machine goes into service, the casino will not have time to recoup the initial jackpot from money gambled by the public. Thus, casinos will tend to set rather low initial jackpots, relying on a percentage of the funds gambled by previous players to contribute the bulk of the progressive jackpot.

into bankruptcy, with the result that the amounts shown on the jackpot indicators would never be won by playing patrons. But this potential nonpayment of an incurred liability exists for every business that uses an accrual method, and it does not prevent accrual. See, *e. g.*, *Wien Consolidated Airlines, Inc.* v. *Commissioner*, 528 F. 2d 735 (CA9 1976). "The existence of an absolute liability is necessary; absolute certainty that it will be discharged by payment is not." *Helvering* v. *Russian Finance & Constr. Corp.*, 77 F. 2d 324, 327 (CA2 1935). And if any of the events hypothesized by the Government should occur, the deducted amounts would qualify as recaptured income subject to tax. Treas. Reg. § 1.461–1(a)(2).

7. Finally, the result in *United States* v. *Anderson*, 269 U. S. 422 (1926), a case to which the Government makes repeated reference, is itself instructive. The issue there was the propriety of the accrual of a federal munitions tax prior to its actual assessment. The assessment was required before the tax became due. The Government's position, in contrast to its position in the present case, was that the tax liability accrued before assessment. The Court held that the absence of the assessment did not prevent accrual of the tax. It recognized that the taxpayer's "true income for the year . . . could not have been determined without deducting . . . the . . . expenses attributable to the production of that income during the year." *Id.*, at 440. One of the expenses that necessarily attended the production of munitions income was the commitment of a particular portion of the revenue generated to a "reserve for munitions taxes." *Ibid.* Similarly, one of the expenses that necessarily attends the production of income from a progressive slot machine is the commitment of a particular portion of the revenue generated to an irrevocable jackpot. Respondent's true income from its progressive slot machines is only that portion of the money gambled which it is entitled to keep.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE STEVENS, with whom THE CHIEF JUSTICE joins, dissenting.

Unlike the Court, see *ante*, at 605–606, I believe that the distinction between the nonpayment of an existing obligation and the nonexistence of an obligation is of controlling importance in this case.

It is common ground that the taxpayer can accrue as a deduction the jackpots in its progressive slot machines only if "all the events have . . . occurred which fix the liability." Treas. Reg. § 1.461–1(a)(2), 26 CFR § 1.461–1(a)(2) (1985). See, *e. g.*, *Security Flour Mills Co.* v. *Commissioner*, 321 U. S. 281, 284, 287 (1944); *Dixie Pine Products Co.* v. *Commissioner*, 320 U. S. 516, 519 (1944); *Brown* v. *Helvering*, 291 U. S. 193, 200–201 (1934). See generally *United States* v. *Consolidated Edison Co. of New York*, 366 U. S. 380, 385–386 (1961). The question is whether an "obligation" created by the rules of a state gaming commission and defeasible at the election of the taxpayer is "fixed" within the meaning of the Treasury Regulation. To me, the answer is clearly "no."

"Under Nevada law," if the taxpayer in this case "were to surrender its gaming license, it would no longer be subject to the gaming laws and regulations and could thus avoid the payment of the liability." App. 23. Thus, "the bankruptcy of the [taxpayer], or the surrender of its gaming license could relieve it of its obligation." *Id.*, at 44.

On these facts, the taxpayer has no present liability to accrue. Rather, the taxpayer's obligation to pay the jackpots in this case resembles the taxpayer's obligation to pay the cost of overhauling its aircraft engines and airframes in *World Airways, Inc.* v. *Commissioner*, 62 T. C. 786 (1974), aff'd, 564 F. 2d 886 (CA9 1977). In that case, the Tax Court held that the taxpayer, an airline, did not satisfy the "all events" test and hence could not accrue and deduct any portion of these costs, 62 T. C., at 802, 805—despite the existence of contracts obligating the taxpayer to pay, upon the completion of an overhaul, an amount for each hour of flight time since the previous overhaul, *id.*, at 791–793, and a statutory obligation to overhaul its engines and airframes after a specified number of flight hours, *id.*, at 803. Of critical importance to the decision before us today, the court distinguished between the *nonpayment* of a legal obligation and the *nonexistence* of an obligation by considering the taxpayer's liability in the event of a bankruptcy:

> "The bankruptcy of petitioner [the taxpayer] or the crash or permanent grounding of an aircraft might conceivably relieve petitioner of the payment of overhaul costs. The occurrences of any of these contingencies, however, would not relieve petitioner of an *existing* obligation to pay any overhaul costs. Rather, the occurrence would mean that no obligation to pay would ever come into existence. Petitioner has not shown that its liability for the accrued overhaul costs was absolutely fixed in the year of accrual. The contingencies referred to would act to prevent a potential liability from coming into existence." *Id.*, at 804 (emphasis in original).

The court recognized that the risk of bankruptcy or disaster was remote. But it added that "there exists another contingency whose occurrence is not unlikely": "Petitioner has sold five piston aircraft and one jet aircraft since 1965. The five piston aircraft owned by petitioner during 1965, and 1966, were sold prior to the time when major airframe overhaul was required." *Ibid.*

Here, too, the taxpayer has no obligation that could be discharged in a bankruptcy court—a fact that confirms that it has no present liability to pay the jackpots on its progressive slot machines. And there likewise exists a contingency under which it is not at all unlikely that a slot machine owner would elect to escape its liability. If the gross amount of the accruals on these machines should ever exceed the net value of the business—perhaps as a result of shrewd management—it could liquidate at a profit without having any liability to anyone for what the Court mistakenly describes as a "fixed liability." By simply tendering its gaming license the taxpayer would avoid its liability on the jackpots. This option is exercisable in the sole discretion of the taxpayer at any point in time. My research has revealed no other instance in which the Commissioner has been forced to allow accrual of a deduction when the expense deducted may be avoided entirely at the election of the taxpayer. This feature of the deduction before us unquestionably contains the "potential for tax avoidance," *Thor Power Tool Co.* v. *Commissioner*, 439 U. S. 522, 538 (1979), and I think it lies well within the Commissioner's authority to interpret the Regulation to forbid it, see *Lucas* v. *American Code Co.*, 280 U. S. 445, 449 (1930). I respectfully dissent.

BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* AMERICAN HOSPITAL ASSOCIATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 84–1529. Argued January 15, 1986—Decided June 9, 1986

Section 504 of the Rehabilitation Act of 1973 provides that "[n]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." In 1984, the Secretary of Health and Human Services (Secretary) promulgated regulations requiring: (1) health care providers receiving federal funds to post notices that because of § 504's prohibition against discrimination on the basis of handicap, health care should not be withheld from infants on the basis of their mental or physical impairments; (2) state child protective services agencies to establish procedures to prevent unlawful medical neglect of handicapped infants, and when considered necessary, in the judgment of the responsible official of the Department of Health and Human Services, to protect a handicapped infant's life or health; (3) immediate access to patient records; and (4) expedited compliance actions. In consolidated actions in Federal District Court, respondents sought to declare the regulations invalid and to enjoin their enforcement. The court granted the requested relief on the authority of *United States* v. *University Hospital*, 729 F. 2d 144 (CA2), and the Court of Appeals affirmed on the basis of that earlier decision.

Held: The judgment is affirmed.

794 F. 2d 676, affirmed.

JUSTICE STEVENS, joined by JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE POWELL, concluded that the regulations in question are not authorized by § 504. Pp. 624–647.

(a) A hospital's withholding of treatment from a handicapped infant when no parental consent has been given cannot violate § 504, for without the parents' consent the infant is neither "otherwise qualified" for treatment nor has he been denied care "solely by reason of his handicap." There is nothing in the administrative record documenting the Secretary's belief that there exists "discriminatory withholding of medical care" in violation of § 504 which would justify federal regulation. None of the examples cited by the Secretary as justification for the regulation suggest that the hospitals receiving federal funds, as opposed to parents, withheld medical care on the basis of handicap. Pp. 630–636.

(b) The complaint-handling process the Secretary would impose on unwilling state agencies is totally foreign to the authority to prevent discrimination conferred on him by § 504. While the Secretary can require state agencies to document their *own* compliance with § 504, nothing in § 504 authorizes him to commandeer state agencies to enforce compliance by *other* recipients of federal funds (in this instance, hospitals). Pp. 637–642.

(c) The Secretary's basis for federal intervention is perceived discrimination against handicapped infants in violation of § 504, and yet the Secretary has pointed to no evidence that such discrimination occurs. The administrative record does not contain the reasoning and evidence necessary to sustain federal intervention into a historically state-administered decisional process that appears—for lack of any contrary evidence—to be functioning in full compliance with § 504. Nothing in § 504 authorizes the Secretary to dispense with the law's focus on discrimination and instead to employ federal resources to save the lives of handicapped newborns, without regard to whether they are victims of discrimination by recipients of federal funds or not. Section 504 does not authorize the Secretary to give unsolicited advice either to parents, to hospitals, or to state officials who are faced with difficult treatment decisions concerning handicapped children. The administrative record demonstrates that the Secretary has asserted the authority to conduct on-site investigations, to inspect hospital records, and to participate in the decisional process in emergency cases in which there was no colorable basis for believing that a violation of § 504 had occurred or was about to occur. These investigative actions are not authorized by § 504, and the regulations that purport to authorize a continuation of them are invalid. Pp. 642–647.

STEVENS, J., announced the judgment of the Court, and delivered an opinion in which MARSHALL, BLACKMUN, and POWELL, JJ., joined. BURGER, C. J., concurred in the judgment. WHITE, J., filed a dissenting opinion, in which BRENNAN, J., joined and in Parts I, II, IV, and V of which O'CONNOR, J., joined, *post*, p. 648. O'CONNOR, J., filed a dissenting opinion, *post*, p. 665. REHNQUIST, J., took no part in the consideration or decision of the case.

Deputy Assistant Attorney General Cooper argued the cause for petitioner. With him on the briefs were *Solicitor General Fried, Assistant Attorney General Reynolds, Dep-*

uty Solicitor General Wallace, Edwin S. Kneedler, Brian K. Landsberg, and *Mark L. Gross.*

Richard L. Epstein argued the cause for respondents American Hospital Association et al. With him on the brief were *Stuart M. Gerson, William G. Kopit, David H. Larry,* and *Robert W. McCann. Benjamin W. Heineman, Jr.*, argued the cause for respondents American Medical Association et al. With him on the brief were *Carter G. Phillips, Vincent F. Prada, Newton N. Minow, Jack R. Bierig, Ann E. Allen,* and *Joseph A. Keyes, Jr.**

JUSTICE STEVENS announced the judgment of the Court and delivered an opinion, in which JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE POWELL join.

This case presents the question whether certain regulations governing the provision of health care to handicapped infants are authorized by § 504 of the Rehabilitation Act of 1973. That section provides, in part:

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*Briefs of *amici curiae* urging reversal were filed for the American Association on Mental Deficiency et al. by *James W. Ellis* and *Ruth A. Luckasson;* for the American Coalition of Citizens with Disabilities et al. by *Thomas K. Gilhool, Frank J. Laski, Michael Churchill,* and *Timothy M. Cook;* for the Associaion for Retarded Citizens of the United States et al. by *Martin H. Gerry;* for the Disability Rights Education & Defense Fund, Inc., et al. by *Barbara M. Milstein;* for the Rutherford Institute et al. by *W. Charles Bundren, Guy O. Farley, Jr., James J. Knicely, John W. Whitehead, Thomas O. Kotouc, Wendell R. Bird,* and *William B. Hollberg;* for Carlton Johnson by *James Bopp, Jr.*, and *Thomas J. Marzen;* and for David G. McLone, M. D., et al. by *Dennis J. Horan, Victor G. Rosenblum, Edward R. Grant,* and *Maura K. Quinlan.*

Briefs of *amici curiae* urging affirmance were filed for the American Academy of Pediatrics et al. by *Stephan E. Lawton, Jack N. Goodman,* and *John A. Hodges;* for the State University of New York by *Robert Abrams,* Attorney General of New York, *Robert Hermann,* Solicitor General, *Frederick K. Mehlman, Stanley A. Camhi, Paul M. Glickman, Donna Miller, Martha O. Shoemaker,* and *Jane Levine,* Assistant Attorneys General, and *Sanford H. Levine;* and for George P. Smith II, *pro se.*

James Bopp, Jr., filed a brief for Senator Orrin G. Hatch et al. as *amici curiae.*

> "No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 87 Stat. 394, 29 U. S. C. § 794.[1]

I

The American Medical Association, the American Hospital Association, and several other respondents[2] challenge the validity of Final Rules promulgated on January 12, 1984, by the Secretary of the Department of Health and Human Services.[3] These Rules establish "Procedures relating to health care for handicapped infants," and in particular require the posting of informational notices, authorize expedited access to records and expedited compliance actions, and command state child protective services agencies to "prevent instances of unlawful medical neglect of handicapped infants." 45 CFR § 84.55 (1985).

Although the Final Rules comprise six parts, only the four mandatory components are challenged here.[4] Subsection (b) is entitled "Posting of informational notice" and requires every "recipient health care provider that provides health care services to infants in programs or activities receiving

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[1] "Handicapped individual" is defined in § 7(7)(B) of the Act, as amended, as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 92 Stat. 2985, 29 U. S. C. § 706(7)(B).

[2] Respondents include the Hospital Association of New York State, the American College of Obstetricians and Gynecologists, the Association of American Medical Colleges, the American Academy of Family Physicians, and certain individual physicians.

[3] Margaret Heckler occupied the position of Secretary throughout the rulemaking period. On December 13, 1985, after certiorari had been granted, Dr. Otis Bowen assumed that position. Despite the fact that Dr. Bowen was not responsible for promulgation of the Final Rules, for the sake of continuity our references assume that he was. For ease of reference we refer to the Secretary, the Department, and HHS interchangeably.

[4] In subsection (a) the Department "encourages each recipient health care provider that provides health care services to infants" to establish an

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"Infant Care Review Committee (ICRC)" to assist in the development of treatment standards for handicapped infants and to provide assistance in making individual treatment decisions. 45 CFR § 84.55(a) (1985). In subsection (f), the Department describes its version of a model ICRC.

Subsection (f) also provides that "[t]he activities of the ICRC will be guided by . . . [t]he interpretative guidelines of the Department." 45 CFR § 84.55(f)(1)(ii)(A) (1985). These guidelines, which are "illustrative" and "do not independently establish rules of conduct," pt. 84, Appendix C, ¶ (a), set forth the Department's interpretation of § 504. Although they do not contain any definition of "discrimination," they do state that § 504 is not applicable to parents and that the regulation applies to only two categories of activities of hospitals: (1) refusals to provide treatment or nourishment to handicapped infants whose parents have consented to, or requested, such treatment; and (2) the failure or refusal to take action to override a parental decision to withhold consent for medically beneficial treatment or nourishment. With respect to the second category, the guidelines state that the hospital may not "solely on the basis of the infant's present or anticipated future mental or physical impairments, fail to follow applicable procedures on reporting such incidents to the child protective services agency or to seek judicial review." 45 CFR pt. 84, Appendix C, ¶ (a)(4) (1985).

With respect to the first category, the guidelines do not state that § 504 categorically prohibits a hospital from withholding requested treatment or nourishment "solely on the basis of present or anticipated physical or mental impairments of an infant." 45 CFR pt. 84, Appendix C, ¶ (a)(1). Rather, the substantive guidelines and two of the illustrative examples recognize that the etiology of and prognosis for particular handicapping conditions may justify "a refusal to treat solely on the basis of those handicapping conditions." ¶ (a)(2) (§ 504 does not require "futile treatment"); ¶ (a)(5)(iii) (§ 504 does not require treatment of anencephaly because it would "do no more than temporarily prolong the act of dying"); ¶ (a)(iv) (same with severely premature and low birth weight infants). In general, the guidelines seem to make a hospital's liability under § 504 dependent on proof that (1) it refused to provide requested treatment or nourishment solely on the basis of an infant's handicapping condition, and (2) the treatment or nourishment would have been medically beneficial. See ¶¶ (a)(1)–(2), (5).

The guidelines also describe how HHS will respond to "complaints of suspected life threatening noncompliance" with § 504 in this context, progress-

Federal financial assistance"—a group to which we refer generically as "hospitals"—to post an informational notice in one of two approved forms. 45 CFR § 84.55(b) (1985). Both forms include a statement that § 504 prohibits discrimination on the basis of handicap, and indicate that because of this prohibition "nourishment and medically beneficial treatment (as determined with respect for reasonable medical judgments) should not be withheld from handicapped infants solely on the basis of their present or anticipated mental or physical impairments." 45 CFR §§ 84.55(b)(3), (4) (1985). The notice's statement of the legal requirement does not distinguish between medical care for which parental consent has been obtained and that for which it has not. The notice must identify the telephone number of the appropriate child protective services agency and, in addition, a toll-free number for the Department that is available 24 hours a day. *Ibid.* Finally, the notice must state that the "identity of callers will be kept confidential" and that federal law prohibits retaliation "against any person who provides information about possible violations." *Ibid.*

Subsection (c), which contains the second mandatory requirement, sets forth "Responsibilities of recipient state child protective services agencies." Subsection (c) does not mention § 504 (or any other federal statute) and does not even use the word "discriminate." It requires every designated agency to establish and maintain procedures to ensure that

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ing from telephone inquiries to the hospital to obtain information about the condition of the infant, to requests for access to records, and finally to onsite investigations and litigation in appropriate cases. ¶ (b). The guidelines do not draw any distinction between cases in which parental consent has been withheld and those in which it has been given. Nor do they draw any distinction between cases in which hospitals have made a report of parental refusal to consent to treatment and those in which no report to a state agency has been made. They do announce that the "Department will also seek to coordinate its investigation with any related investigations by the state child protective services agency so as to minimize potential disruption," ¶ (b)(4), indicating that the Department's investigations may continue even in cases that have previously been referred to a state agency.

"the agency utilizes its full authority pursuant to state law to prevent instances of unlawful medical neglect of handicapped infants." 45 CFR § 84.55(c)(1). Mandated procedures must include (1) "[a] requirement that health care providers report on a timely basis . . . known or suspected instances of unlawful medical neglect of handicapped infants," § 84.55(c)(1)(i); (2) a method by which the state agency can receive timely reports of such cases, § 84.55(c)(1)(ii); (3) "immediate" review of those reports, including "on-site investigation," where appropriate, § 84.55(c)(1)(iii); (4) protection of "medically neglected handicapped infants" including, where appropriate, legal action to secure "timely court order[s] to compel the provision of necessary nourishment and medical treatment," § 84.55(c)(1)(iv); and (5) "[t]imely notification" to HHS of every report of "suspected unlawful medical neglect" of handicapped infants. The preamble to the Final Rules makes clear that this subsection applies "where a refusal to provide medically beneficial treatment is a result, not of decisions by a health care provider, but of decisions by parents." 49 Fed. Reg. 1627 (1984).

The two remaining mandatory regulations authorize "[e]xpedited access to records" and "[e]xpedited action to effect compliance." 45 CFR §§ 84.55(d), (e) (1985). Subsection (d) provides broadly for immediate access to patient records on a 24-hour basis, with or without parental consent, "when, in the judgment of the responsible Department official, immediate access is necessary to protect the life or health of a handicapped individual." § 84.55(d). Subsection (e) likewise dispenses with otherwise applicable requirements of notice to the hospital "when, in the judgment of the responsible Department official, immediate action to effect compliance is necessary to protect the life or health of a handicapped individual." § 84.55(e). The expedited compliance provision is intended to allow "the government [to] see[k] a temporary restraining order to sustain the life of a handicapped infant in imminent danger of death." 49 Fed. Reg. 1628 (1984). Like the provision affording expedited access to records, it applies without regard to whether parental consent to treatment has been withheld or whether the matter has already been referred to a state child protective services agency.

II

The Final Rules represent the Secretary's ultimate response to an April 9, 1982, incident in which the parents of a Bloomington, Indiana, infant with Down's syndrome and other handicaps refused consent to surgery to remove an esophageal obstruction that prevented oral feeding. On April 10, the hospital initiated judicial proceedings to override the parents' decision, but an Indiana trial court, after holding a hearing the same evening, denied the requested relief. On April 12 the court asked the local Child Protection Committee to review its decision. After conducting its own hearing, the Committee found no reason to disagree with the court's ruling.[5] The infant died six days after its birth.

Citing "heightened public concern" in the aftermath of the Bloomington Baby Doe incident, on May 18, 1982, the director of the Department's Office of Civil Rights, in response to a directive from the President, "remind[ed]" health care providers receiving federal financial assistance that newborn infants with handicaps such as Down's syndrome were protected by § 504. 47 Fed. Reg. 26027 (1982).[6]

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[5] At the instance of the local prosecutor, the Indiana courts on April 13 held another hearing at which the court concluded that "Baby Doe" had not been neglected under Indiana's Child in Need of Services statute. Additional attempts to seek judicial intervention were rebuffed the same day. On the following day, the Indiana Court of Appeals denied a request for an immediate hearing. *In re Infant Doe*, No. GU 8204-004A (Monroe County Cir. Ct., Apr. 12, 1982). The Indiana Supreme Court, by a vote of 3 to 1, rejected a petition for a writ of mandamus. *State ex rel. Infant Doe* v. *Baker*, No. 482 S 140 (May 27, 1982). The infant died while a stay was being sought in this Court, and we subsequently denied certiorari. *Infant Doe* v. *Bloomington Hospital*, 464 U. S. 961 (1983).

This notice was followed, on March 7, 1983, by an "Interim Final Rule" contemplating a "vigorous federal role." 48 Fed. Reg. 9630. The Interim Rule required health care providers receiving federal financial assistance to post "in a conspicuous place in each delivery ward, each maternity ward, each pediatric ward, and each nursery, including each intensive care nursery" a notice advising of the applicability of § 504 and the availability of a telephone "hotline" to report suspected violations of the law to HHS. *Id.*, at 9631. Like the Final Rules, the Interim Rule also provided for expedited compliance actions and expedited access to records and facilities when, "in the judgment of the responsible Department official," immediate action or access was "necessary to protect the life or health of a handicapped individual." *Id.*, at 9632. The Interim Rule took effect on March 22.

On April 6, 1983, respondents American Hospital Association et al. filed a complaint in the Federal District Court for the Southern District of New York seeking a declaration that the Interim Final Rule was invalid and an injunction against its enforcement. Little more than a week later, on April 14, in a similar challenge brought by the American Academy of Pediatrics and other medical institutions, the Federal District Court for the District of Columbia declared the Interim Final Rule "arbitrary and capricious and promulgated in violation of the Administrative Procedure Act." *American Academy of Pediatrics* v. *Heckler*, 561 F. Supp. 395, 404 (1983). The District Judge in that case "conclude[d] that haste and inexperience ha[d] resulted in agency action based on inadequate consideration" of several relevant concerns and, in the alternative, found that the Secretary had improperly failed to solicit public comment before issuing the Rule. *Id.*, at 399–401.

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[6] The notice maintained that hospitals would violate § 504 if they "allow[ed] [an] infant" to remain in their care after "the infant's parents or guardian [had withheld consent to] treatment or nourishment discriminatorily." 47 Fed. Reg. 26027 (1982). The Secretary no longer subscribes to this reading of the statute. See 49 Fed. Reg. 1631 (1984).

On July 5, 1983, the Department issued new "Proposed Rules" on which it invited comment. Like the Interim Final Rule, the Proposed Rules required hospitals to post informational notices in conspicuous places and authorized expedited access to records to be followed, if necessary, by expedited compliance action. 48 Fed. Reg. 30851. In a departure from the Interim Final Rule, however, the Proposed Rules required federally assisted state child protective services agencies to utilize their "full authority pursuant to State law to prevent instances of medical neglect of handicapped infants." *Ibid.* Mandated procedures mirrored those contained in the Final Rules described above. *Ibid.* The preamble and appendix to the Proposed Rules did not acknowledge that hospitals and physicians lack authority to perform treatment to which parents have not given their consent.[7]

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[7] In explaining the need for the Proposed Rules, the preamble, although mentioning "parental rights over their children," insisted that physicians' "acquiescence in nontreatment of Down's children is apparently *because of* the handicap," rather than, it must be supposed, lack of parental consent. 48 Fed. Reg. 30848 (1983).

The effect of parental nonconsent was not even mentioned in the appendix to the Proposed Rules. That section, which set forth the Department's view of "the manner in which Section 504 applies to the provision of health care services to handicapped infants," *id.*, at 30851, declared that § 504 mandated "the basic provision of nourishment, fluids, and routine nursing care." *Id.*, at 30852. The provision of sustenance, according to the Department, was "not an option for medical judgment." *Ibid.* Thus, "[e]ven if a handicapped infant faces imminent and unavoidable death, no health care provider should take upon itself to cause death by starvation or dehydration." *Ibid.*

In addition to its unqualified endorsement of nourishment as required by § 504, the appendix announced that "[a]ny decision not to correct intestinal atresia in a Down's Syndrome child, unless an additional complication medically warrants such decision, *must* be deemed a denial of services based on

After the period for notice and comment had passed, HHS, on December 30, 1983, promulgated the Final Rules and announced that they would take effect on February 13, 1984. On March 12 of that year respondents American Hospital Association et al. amended their complaint and respondents American Medical Association et al. filed suit to declare the new regulations invalid and to enjoin their enforcement. The actions were consolidated in the Federal District Court for the Southern District of New York, which awarded the requested relief on the authority of the decision of the United States Court of Appeals for the Second Circuit in *United States* v. *University Hospital*, 729 F. 2d 144 (1984). *American Hospital Assn.* v. *Heckler*, 585 F. Supp. 541 (1984); App. to Pet. for Cert. 50a. On appeal, the parties agreed that the reasoning of the Court of Appeals in *University Hospital*, if valid, required a judgment against the Government in this case.[8] In accordance with its earlier decision, the Court of Appeals summarily affirmed the District Court. 694 F. 2d 676 (1984). Since the judgment here thus rests entirely on the reasoning of *University Hospital*, it is appropriate to examine that case now.

III

On October 11, 1983, after the Department's Interim Final Rule had been declared invalid but before it had promulgated the Final Rules challenged here, a child with multiple congenital defects known as "Baby Jane Doe" was born in Long

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the handicap of Down's Syndrome. The same reasoning applies to a case of Down's Syndrome [infant] with esophogeal atresia, and the denial of surgery to correct atresia." *Ibid.* (emphasis added). The Department did not discuss the relevance of parental nonconsent to the hospital's treatment obligation under § 504, presumably because it was irrelevant given its understanding of the provision at that time.

[8] Indeed, although the Government took an appeal from the District Court's judgment, it filed a motion for summary disposition after the Court of Appeals denied its motion for initial consideration en banc. Its motion expressly acknowledged that an affirmance was compelled by the decision in *University Hospital*.

Island, New York, and was promptly transferred to University Hospital for corrective surgery. After consulting with physicians and other advisers, the parents decided to forgo corrective surgery that was likely to prolong the child's life, but would not improve many of her handicapping conditions.

On October 16, 1983, an unrelated attorney named Washburn filed suit in the New York Supreme Court, seeking the appointment of a guardian *ad litem* for the infant who would direct the hospital to perform the corrective surgery. The trial court granted that relief on October 20, but was reversed the following day by the Appellate Division which found that the "concededly concerned and loving parents" had "chosen one course of appropriate medical treatment over another" and made an informed decision that was "in the best interest of the infant." *Weber* v. *Stony Brook Hospital*, 95 App. Div. 2d 587, 589, 467 N. Y. S. 2d 685, 687 *(per curiam)*. On October 28, the New York Court of Appeals affirmed, but on the ground that the trial court should not have entertained a petition to initiate child neglect proceedings by a stranger who had not requested the aid of the responsible state agency. *Weber* v. *Stony Brook Hospital*, 60 N. Y. 2d 208, 211–213, 456 N. E. 2d 1186, 1187–1188 *(per curiam)*.

While the state proceedings were in progress, on October 19, HHS received a complaint from a "private citizen" that Baby Jane Doe was being discriminatorily denied medically indicated treatment. HHS promptly referred this complaint to the New York State Child Protective Service. (The agency investigated the charge of medical neglect and soon thereafter concluded that there was no cause for state intervention.) In the meantime, before the State Child Protective Service could act, HHS on October 22, 1983, made repeated requests of the hospital to make its records available for inspection in order to determine whether the hospital was in compliance with § 504. The hospital refused the requests and advised HHS that the parents had not consented to a release of the records.

Subsequently, on November 2, 1983, the Government filed suit in Federal District Court invoking its general authority to enforce § 504 and 45 CFR § 84.61 (1985), a regulation broadly authorizing access to information necessary to ascertain compliance. The District Court allowed the parents to intervene as defendants, expedited the proceeding, and ruled against the Government. It reasoned that the Government had no right of access to information because the record clearly established that the hospital had not violated the statute. *United States* v. *University Hospital, State Univ. of N. Y. at Stony Brook*, 575 F. Supp. 607, 614 (EDNY). Since the uncontradicted evidence established that the hospital "ha[d] at all times been willing to perform the surgical procedures in question, if only the parents . . . would consent," the hospital "failed to perform the surgical procedures in question, not because Baby Jane Doe [wa]s handicapped, but because her parents ha[d] refused to consent." *Ibid.*

The Court of Appeals affirmed. In an opinion handed down on February 23, 1984, six weeks after promulgation of the Final Rules, it agreed with the District Court that "an agency is not entitled to information sought in an investigation that 'overreaches the authority Congress has given.'" 729 F. 2d, at 150 (quoting *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 217 (1946)). It further held that although Baby Jane Doe was a "handicapped individual," she was not "otherwise qualified" within the meaning of § 504 because "where medical treatment is at issue, it is typically the handicap itself that gives rise to, or at least contributes to the need for services"; as a result "the 'otherwise qualified' criterion of section 504 cannot be meaningfully applied to a medical treatment decision." 729 F. 2d, at 156. For the same reason, the Court of Appeals rejected the Government's argument that Baby Jane Doe had been "subjected to discrimination" under § 504: "Where the handicapping condition is related to the condition(s) to be treated, it will rarely, if ever, be possible to say with certainty that a particular decision was 'discriminatory'." *Id.*, at 157. The difficulty of applying § 504 to individual medical treatment decisions confirmed the Court of Appeals in its view that "[C]ongress never contemplated that section 504 of the Rehabilitation Act would apply to treatment decisions involving defective newborn infants when the statute was enacted in 1973, when it was amended in 1974, or at any subsequent time." *Id.*, at 161. It therefore rejected "the far-reaching position advanced by the government in this case" and concluded that until Congress had spoken, "it would be an unwarranted exercise of judicial power to approve the type of investigation that ha[d] precipitated this lawsuit." *Ibid.*

Judge Winter dissented. He pointed out that § 504 was patterned after § 601 of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race in federally funded programs, and asserted that a refusal to provide medical treatment because of a person's handicapping condition is as clearly covered by § 504 as a refusal based on a person's race is covered by § 601:

> "A judgment not to perform certain surgery because a person is black is not a *bona fide* medical judgment. So too, a decision not to correct a life threatening digestive problem because an infant has Down's Syndrome is not a *bona fide* medical judgment. The issue of parental authority is also quickly disposed of. A denial of medical treatment to an infant because the infant is black is not legitimated by parental consent." *Id.*, at 162.

The Government did not file a certiorari petition in *University Hospital.* It did, however, seek review of the judgment in this case. We granted certiorari, 472 U. S. 1016 (1985), and we now affirm.

IV

The Solicitor General is correct that "handicapped individual" as used in § 504 includes an infant who is born with a congenital defect. If such an infant is "otherwise qualified" for benefits under a program or activity receiving federal financial assistance, § 504 protects him from discrimination "solely by reason of his handicap."[9] It follows, under our decision in *Alexander* v. *Choate*, 469 U. S. 287, 301 (1985), that handicapped infants are entitled to "meaningful access" to medical services provided by hospitals, and that a hospital rule or state policy denying or limiting such access would be subject to challenge under § 504.

However, no such rule or policy is challenged, or indeed has been identified, in this case. Nor does this case, in contrast to the *University Hospital* litigation, involve a claim that any specific individual treatment decision violates § 504. This suit is not an enforcement action, and as a consequence it is not necessary to determine whether § 504 ever applies to individual medical treatment decisions involving handicapped infants. Respondents brought this litigation to challenge the four mandatory components of the Final Rules on their face,[10] and the Court of Appeals' judgment which we review merely affirmed the judgment of the District Court which "declared invalid and enjoined enforcement of [the final] regulations, purportedly promulgated pursuant to section 504 of the Rehabilitation Act of 1973, 29 U. S. C. § 794 (1982)." App. to Pet. for Cert. 2a.[11] The specific question presented by this case, then, is whether the four mandatory provisions of the Final Rules are authorized by § 504.

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[9] As the case comes to us, we have no reason to review the Court of Appeals' assumption that the provision of health care to infants in hospitals receiving Medicare or Medicaid payments is a part of a "program or activity receiving Federal financial assistance." See *Consolidated Rail Corp.* v. *Darrone*, 465 U. S. 624, 635–636 (1984).

[10] See, *e. g.*, Brief in Opposition for Respondents American Medical Assn. et al. 7–8, n. 8; Record, Doc. No. 4, Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction 12 ("The Final Regulation which is challenged in this action contains four mandatory provisions" (citations omitted)); *id.*, at 28 ("After *University Hospital* . . . must fall all of the mandatory obligations imposed by the Final Regulation"). Cf. App. 138–140 (complaint of American Medical Association et al.).

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[11] It is true that the District Court, in addition to declaring "[t]he Final Regulation . . . invalid and unlawful as exceeding" § 504 and enjoining petitioner from "any further implementation of the Final Regulation," also declared invalid and enjoined "[a]ny other actions" of the Secretary "to regulate treatment involving impaired newborn infants taken under authority of Section 504, including currently pending investigation and other enforcement actions." App. to Pet. for Cert. 51a. This language must, however, be given a limited construction. The complaints in this case did not challenge the Department's authority to regulate all treatment decisions, but more precisely the mandatory provisions of the Final Rules and enforcement activity along those lines but undertaken pursuant to the Department's "general authority" to enforce § 504, as occurred in the *University Hospital* litigation and in 41 of the 49 full-scale investigations conducted by the Secretary up to that point in time. See App. 138–139 (complaint of American Medical Association et al.); *id.*, at 145 (same); *id.*, at 159 (complaint of American Hospital Association et al.). See also Record, Doc. No. 4, Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction 10–11. From these pleadings, the Court of Appeals apparently interpreted the District Court's use of the word "any" to forbid "[a]ny other actions" resembling the "currently pending investigation and other enforcement actions" specified in the injunction, App. to Pet. for Cert. 51a, rather than all possible regulatory and investigative activity that might involve the provision of health care to handicapped infants. Thus, as will become clear from our analysis of the Final Rules below, the injunction forbids continuation or initiation of regulatory and investigative activity directed at instances in which parents have refused consent to treatment and, if the Secretary were to undertake such action, efforts to seek compliance with affirmative requirements imposed on state child protective services agencies. "Because of the rightly serious view courts have traditionally taken of violations of injunctive orders, and because of the severity of punishment which may be imposed for such violation," *Pasadena City Bd. of Education* v. *Spangler*, 427 U. S. 424, 439 (1976); see *Longshoremen* v. *Marine Trade Assn.*, 389 U. S. 64, 76 (1967); *Gunn* v. *University Committee*, 399 U. S. 383, 389 (1970), the Court of Appeals properly construed the District Court's judgment as pertaining to the regulations challenged in this litigation (and enforcement activity independent of the Final Rules but paralleling the procedures set forth therein). Cf. *Schmidt* v. *Lessard*, 414 U. S. 473, 477 (1974) *(per curiam)*

V

It is an axiom of administrative law that an agency's explanation of the basis for its decision must include "a 'rational connnection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Assn.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156, 168 (1962)).[12] Agency deference has not come so far that we will uphold regulations whenever it is possible to "conceive a basis" for administrative action. To the contrary, the "presumption of

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(noting desirability of precise construction of injunction orders to facilitate appellate review). It is, of course, the Court of Appeals' judgment that we are called on to review, not the District Court's. See *Union Pacific R. Co.* v. *Chicago, R. I. & P. R. Co.*, 163 U. S. 564, 593 (1896). Cf. *Davis* v. *Packard*, 6 Pet. 41, 49 (1832). Accordingly, we give great weight to the Court of Appeals' construction of the judgment it affirmed. Cf. *United States* v. *Colgate & Co.*, 250 U. S. 300, 301–302 (1919). For purposes of comparison, the dissent's expansive reading of the judgment is supported neither by the Court of Appeals nor by the parties. See Brief for Respondents American Medical Assn. et al. 14, 48, n. 60. Cf. Brief for Respondents American Hospital Assn. et al. 4 (quoting final judgment of the District Court). In view of the fact that we affirm this judgment on reasoning narrower than that employed by the lower courts, it bears repetition that this Court "reviews judgments, not opinions." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842 (1984). See, *e. g., Black* v. *Cutter Laboratories*, 351 U. S. 292, 297 (1956); *J. E. Riley Investment Co.* v. *Commissioner*, 311 U. S. 55, 59 (1940); *Williams* v. *Norris*, 12 Wheat. 117, 120 (1827); *McClung* v. *Silliman*, 6 Wheat. 598, 603 (1821).

[12] See *Baltimore Gas & Electric Co.* v. *Natural Resources Defense Council, Inc.*, 462 U. S. 87, 105–106 (1983); *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U. S. 281, 285–286 (1974); *FTC* v. *Sperry & Hutchinson Co.*, 405 U. S. 233, 249 (1972); *FPC* v. *United Gas Pipe Line Co.*, 393 U. S. 71, 72–73 (1968) *(per curiam); Siegel Co.* v. *FTC*, 327 U. S. 608, 613 (1946).

regularity afforded an agency in fulfilling its statutory mandate" is not equivalent to "the minimum rationality a statute must bear in order to withstand analysis under the Due Process Clause." *Motor Vehicle Mfrs. Assn.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S., at 43, n. 9. Thus, the mere fact that there is "some rational basis within the knowledge and experience of the [regulators]," *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 (1938) (footnote omitted), under which they "might have concluded" that the regulation was necessary to discharge their statutorily authorized mission, *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 487 (1955), will not suffice to validate agency decisionmaking. See *Industrial Union Dept.* v. *American Petroleum Inst.*, 448 U. S. 607, 639–659 (1980) (opinion of STEVENS, J.); *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156, 169 (1962). Our recognition of Congress' need to vest administrative agencies with ample power to assist in the difficult task of governing a vast and complex industrial Nation carries with it the correlative responsibility of the agency to explain the rationale and factual basis for its decision, even though we show respect for the agency's judgment in both.

Before examining the Secretary's reasons for issuing the Final Rules, it is essential to understand the pre-existing state-law framework governing the provision of medical care to handicapped infants. In broad outline, state law vests decisional responsibility in the parents, in the first instance, subject to review in exceptional cases by the State acting as *parens patriae.*[13] Prior to the regulatory activity culminat-

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[13] The basic pattern of decisionmaking is well summarized in the 1983 report of the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research:

"The paucity of directly relevant cases makes characterization of the law in this area somewhat problematic, but certain points stand out. First, there is a presumption, strong but rebuttable, that parents are the approing in the Final Rules, the Federal Government was not a participant in the process of making treatment decisions for newborn infants. We presume that this general framework was familiar to Congress when it enacted § 504. See *Cannon* v. *University of Chicago*, 441 U. S. 677, 696–697 (1979). It therefore provides an appropriate background for evaluating the Secretary's action in this case.

The Secretary has identified two possible categories of violations of § 504 as justifications for federal oversight of handicapped infant care. First, he contends that a hospital's refusal to furnish a handicapped infant with medically beneficial treatment "solely by reason of his handicap" constitutes unlawful discrimination. Second, he maintains that a hospital's failure to report cases of suspected medical neglect to a

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priate decisionmakers for their infants. Traditional law concerning the family, buttressed by the emerging constitutional right of privacy, protects a substantial range of discretion for parents. Second, as persons unable to protect themselves, infants fall under the *parens patriae* power of the state. In the exercise of this authority, the state not only punishes parents whose conduct has amounted to abuse or neglect of their children but may also supervene parental decisions before they become operative to ensure that the choices made are not so detrimental to a child's interests as to amount to neglect and abuse.

". . . [A]s long as parents choose from professionally accepted treatment options the choice is rarely reviewed in court and even less frequently supervened. The courts have exercised their authority to appoint a guardian for a child when the parents are not capable of participating in the decisionmaking or when they have made decisions that evidence substantial lack of concern for the child's interests. Although societal involvement usually occurs under the auspices of governmental instrumentalities—such as child welfare agencies and courts—the American legal system ordinarily relies upon the private initiative of individuals, rather than continuing governmental supervision, to bring the matter to the attention of legal authorities." Report, at 212–214 (footnotes omitted).

This summary accords with the Secretary's understanding of the state-law framework, at least in other contexts. See 50 Fed. Reg. 14880 (1985) (final rule implementing Child Abuse Amendments of 1984) ("The decision to provide or withhold medically indicated treatment is, except in highly unusual circumstances, made by the parents or legal guardian").

state child protective services agency may also violate the statute. We separately consider these two possible bases for the Final Rules.[14]

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[14] Rather than address these issues, JUSTICE WHITE's dissent would remand to the Court of Appeals. See *post*, at 656. In light of its willingness to address the broader hypothetical question whether § 504 ever authorizes regulation of medical treatment decisions—"even if the judgment below were limited to invalidation of these regulations," *post*, at 650, n. 4—it comes as something of a surprise to read the references to the Solicitor General's argument that "this claim in its current form is not properly in the case," *post*, at 657, n. 9. The procedural objections are plainly without substance. Respondents AMA et al. raised the lack of factual support in their brief in opposition to the petition for certiorari. See Brief in Opposition for Respondents American Medical Assn. et al. 20 ("First, the fundamental problem with the Secretary's position is that it is based on a situation that has not occurred—and will not occur—in real life. . . . Not surprisingly, the Secretary cites no case where [his hypothetical problem] has occurred"); *id.*, at 20–21; *id.*, at 26 ("B. The Secretary Has Shown No Problem With the Historic State Law Framework That Warrants Direct Federal Investigation and Regulation"); *id.*, at 26–29. The Solicitor General, although responding that such evidence exists, see Reply Memorandum for Petitioner 9, did not raise a procedural bar. As a result, the objection is waived. See *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 815–816 (1985). Although further discussion of this objection is therefore unnecessary, the dissent is also wrong in suggesting that respondents' complaints did not raise "the lack of a factual basis involving situations in which parents *have* consented to treatment." *Post*, at 657, n. 9. In fact, the complaint of respondents AMA et al. alleged "COUNT II: Violation of the Administrative Procedure Act," App. 146, and incorporated by reference the allegation that "None of the mandatory provisions of the Final Regulation have a basis in fact or are designed to meet a documented problem," *id.*, at 140. Accord, *id.*, at 158 (complaint of respondents AHA et al.). The fact that our decision rests on grounds narrower than that relied on by the lower courts is surely not an infirmity. We can only add that the lack of factual support for these regulations was fully briefed in this Court, see especially Brief for Respondents American Medical Assn. et al. 39–41; Brief for Respondents American Hospital Assn. et al. 48–49, and the fact that the Solicitor General responds with so little, so late bespeaks the absence of evidentiary support for the regulations, not an inadequate opportunity to direct us to it.

The Solicitor General also contends, for the first time in his reply brief on the merits, see Reply Brief for Petitioner 16, n. 6, that the Final Rules are

VI

In the immediate aftermath of the Bloomington Baby Doe incident, the Secretary apparently proceeded on the assumption that a hospital's statutory duty to provide treatment to handicapped infants was unaffected by the absence of parental consent. See *supra*, at 617–619. He has since abandoned that view. Thus, the preamble to the Final Rules correctly states that when "a non-treatment decision, no matter how discriminatory, is made by parents, rather than by the hospital, section 504 does not mandate that the hospital unilaterally overrule the parental decision and provide treatment notwithstanding the lack of consent." 49 Fed. Reg. 1631 (1984). A hospital's withholding of treatment when no parental consent has been given cannot violate § 504, for without the consent of the parents or a surrogate decisionmaker the infant is neither "otherwise qualified" for treatment nor has he been denied care "solely by reason of his handicap." [15] Indeed, it would almost certainly be a tort as a matter of state law to operate on an infant without parental consent. This analysis makes clear that the Government's heavy reliance on the analogy to race-based refusals which violate § 601

"interpretative guidelines" which "merely explained the Secretary's construction of Section 504 in this setting," *ibid.* This assertion was rejected the only occasion on which it was tendered, see *American Academy of Pediatrics* v. *Heckler*, 561 F. Supp. 395, 401 (DC 1983), is belied by the Secretary's own decision to provide notice and request comment on the regulations, cf. 5 U. S. C. § 553(b), and is patently without merit. To its credit, the dissent does not ultimately rely on either of these arguments. See *post*, at 657, n. 9.

[15] Just as "[t]he failure of the hospital to itself provide the treatment" because of the unavailability of medical equipment or expertise would not be "on the basis of the handicap" but "on the fact that the hospital is incapable of providing the treatment," according to the Secretary's regulations, 49 Fed. Reg. 1637 (1984), it is equally clear that a refusal to provide care because of the absence of parental consent would not be "solely by reason of [the infant's] handicap."

of the Civil Rights Act is misplaced. If, pursuant to its normal practice, a hospital refused to operate on a black child whose parents had withheld their consent to treatment, the hospital's refusal would not be based on the race of the child even if it were assumed that the parents based *their decision* entirely on a mistaken assumption that the race of the child made the operation inappropriate.

Now that the Secretary has acknowledged that a hospital has no statutory treatment obligation in the absence of parental consent, it has become clear that the Final Rules are not needed to prevent hospitals from denying treatment to handicapped infants. The Solicitor General concedes that the administrative record contains no evidence that hospitals have ever refused treatment authorized either by the infant's parents or by a court order. Tr. of Oral Arg. 8. Even the Secretary never seriously maintained that posted notices, "hotlines," and emergency on-site investigations were necessary to process complaints against hospitals that might refuse treatment requested by parents. The parental interest in calling such a refusal to the attention of the appropriate authorities adequately vindicates the interest in enforcement of § 504 in such cases, just as that interest obviates the need for a special regulation to deal with refusals to provide treatment on the basis of race which may violate § 601 of the Civil Rights Act.

The Secretary's belated recognition of the effect of parental nonconsent is important, because the supposed need for federal monitoring of hospitals' treatment decisions rests *entirely* on instances in which parents have refused their consent. Thus, in the Bloomington, Indiana, case that precipitated the Secretary's enforcement efforts in this area,[16] as

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[16] The Secretary's summary of this case makes it clear that the hospital's failure to perform surgery was based on the parents' refusal of consent:

"*Bloomington, Indiana.* Investigation into April 1982, death of infant with Down's syndrome and esophageal atresia from whom surgery was well as in the *University Hospital* case that provided the basis for the summary affirmance in the case now before us,[17] the hospital's failure to perform the treatment at issue rested on the lack of parental consent. The Secretary's own summaries of these cases establish beyond doubt that the respective hospitals did not withhold medical care on the basis of handicap and therefore did not violate § 504; as a result, they provide no support for his claim that federal regulation is needed in order to forestall comparable cases in the future.

The Secretary's initial failure to recognize that withholding of consent by *parents* does not equate with discriminatory denial of treatment by *hospitals* likewise undermines the Secretary's findings in the preamble to his proposed rulemaking. In that statement, the Secretary cited four sources in support of the claim that "Section 504 [is] not being uniformly followed." 48 Fed. Reg. 30847 (1983). None of the cited examples, however, suggests that recipients of federal financial assistance, as opposed to parents, had withheld medical care on the basis of handicap.[18]

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withheld *on the instructions of the parents." Id.*, at 1646 (emphasis added).

As recounted earlier, the hospital initiated judicial review to override the parents' decision, but its efforts proved unavailing. The Solicitor General now acknowledges that there was no basis for finding a violation of § 504 in this case. See Tr. of Oral Arg. 12.

[17] Notwithstanding that the Secretary's summary of this case demonstrates both that treatment was withheld because of refusal of parental consent and that state-court proceedings to override the parents' decision had been instituted before the Department intervened, the Department proceeded with its own investigation anyway:

"*Long Island, New York.* October 19, 1983, complaint, based on newspaper article, that infant with spina bifida not receiving surgery *due to refusal of parents to consent; legal proceedings ha[d] been initiated in State court.* Inquiry initiated October 19. On October 27, HHS asked Department of Justice to commence legal action to overcome refusal of hospital to permit review of pertinent records." 49 Fed. Reg. 1649 (1984) (emphasis added).

[18] The Secretary first cited a 1973 survey by Raymond Duff and A. G. M. Campbell calculating that 14% of deaths in the special nursery of the Yale-

Notwithstanding the ostensible recognition in the preamble of the effect of parental nonconsent on a hospital's obligation to provide care, in promulgating the Final Rules the Secretary persisted in relying on instances in which parents had refused consent to support his claim that, regardless of its "magnitude," there is sufficient evidence of "illegality" to justify "establishing basic mechanisms to allow for effective enforcement of a clearly applicable statute." 49 Fed. Reg. 1645 (1984). We have already discussed one source of this evidence—"the several specific cases cited in the preamble to the proposed rule." *Ibid.* Contrary to the Secretary's belief, these cases do *not* "support the proposition that handicapped infants may be subjected to unlawful discrimination." *Ibid.* In addition to the evidence relied on in prior notices, the Secretary included a summary of the 49 "Infant Doe

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New Haven hospital "were related to withholding treatment." 48 Fed. Reg. 30847 (1983). The Secretary's solitary quotation from this study, accurately illustrating the locus of the treatment decisions reviewed by the authors, involved refusal of parental consent:

"'An infant with Down's syndrome and intestinal atresia, like the much publicized one at Johns Hopkins Hospital, was not treated *because his parents thought the surgery was wrong for their baby and themselves.* He died several days after birth.'" *Ibid.* (emphasis added) (quoting Duff & Campbell, Moral and Ethical Dilemmas in the Special-Care Nursery, 289 New Eng. J. Med. 890, 891 (1973)).

The Secretary next referred to an incident at Johns Hopkins Hospital which, as the above quotation intimates, also concerned parental refusal of consent. Then followed brief mention of the "Bloomington Baby Doe" incident, in which the parents, as the Secretary now admits, refused consent to treatment despite the hospital's insistence that it be provided. The Secretary's fourth and final example involved "a 1979 death of an infant with Down's syndrome and an intestinal obstruction at the Kapiolani-Children's Medical Center in Honolulu, Hawaii," 48 Fed. Reg. 30847 (1983), which again appears to have resulted from "a lack of parental consent," *id.*, at 30848.

Generalizing from these examples, the Secretary reported the results of a survey of physician attitudes. He faulted "[t]heir acquiescence in nontreatment of Down's children" which he surmised was "apparently *because of* the handicap represented by Down's syndrome." *Ibid.* See n. 22, *infra.*

cases" that the Department had processed before December 1, 1983.[19] Curiously, however, by the Secretary's own admission *none* of the 49 cases had "resulted in a finding of discriminatory withholding of medical care." *Id.*, at 1649. In fact, in the entire list of 49 cases there is no finding that a hospital failed or refused to provide treatment to a handicapped infant for which parental consent had been given.[20]

Notwithstanding this concession, the Secretary "believes three of these cases demonstrate the utility of the procedural mechanisms called for in the final rules." *Ibid.* Accord, *ibid.* ("[T]hese cases provide additional documentation of the need for governmental involvement and the appropriateness of the procedures established by the final rules"). However, these three cases, which supposedly provide the strongest support for federal intervention, fail to disclose any discrimination against handicapped newborns in violation of § 504. For example, in Robinson, Illinois, the Department conducted an on-site investigation when it learned that the "hospital *(at the parents' request)* failed to perform necessary surgery." *Id.*, at 1646 (emphasis added). After "[t]he parents refused consent for surgery," "the hospital referred the matter to state authorities, who accepted custody of the infant and arranged for surgery and adoption," all "in compliance with section 504." *Ibid.* The Secretary concluded that "the involvement of the state child protective services agency," at the behest of the hospital, "was the most important element in bringing about corrective surgery for the infant. . . . Had there been no *governmental* involvement in the case, the outcome might have been much less favorable." *Id.*, at 1649 (emphasis added).[21]

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[19] The Secretary also reprinted selected quotations from various commenters reporting the existence of "discriminatory" decisions denying sustenance and care to handicapped infants. None of these comments disclosed whether those "discriminatory" decisions were made by parents or by hospitals.

[20] The Secretary's repeated inability to identify a single treatment decision in violation of § 504 lends an aura of unreality to JUSTICE WHITE's criticism of the Court of Appeals' decision in *University Hospital*. In explaining why he believes "the stated basis for the Court of Appeals' holding in *University Hospital* was incorrect," *post*, at 656; see *post*, at 655, n. 8, JUSTICE WHITE completely ignores the fact that the case involved a specific treatment decision made by parents. Since JUSTICE WHITE elsewhere agrees that parental decisions are not covered by § 504, *post*, at 657, n. 10, and that the infant involved in the *University Hospital* case was therefore not "otherwise qualified" for treatment, *post*, at 654, n. 7, he implicitly acknowledges that the *judgment* in *University Hospital* is correct; only by ignoring the actual facts of that case—as well as the actual facts of the 49 cases that were investigated by the Secretary—and speculating about nonexistent hypothetical cases in which a hospital might refuse to provide treatment requested by parents, does the dissent offer any basis for questioning the decision in *University Hospital*.

Indeed, even the dissent's criticism of the *reasoning* of the Court of Appeals' decision is based on a hypothetical situation that the Court of Appeals did not address. That court was concerned with the treatment of cases in which "the handicapping condition *is related* to the condition(s) to be treated," 729 F. 2d, at 157 (emphasis added); see *id.*, at 147, whereas JUSTICE WHITE has carefully limited his hypothetical discussion to cases in which "the treatment *is completely unrelated* to the baby's handicapping condition." *Post*, at 655 (emphasis added). Thus, like bishops of opposite colors, the opinions of JUSTICE WHITE and the Court of Appeals do not even touch one another.

The Secretary's second example illustrates with even greater force the effective and nondiscriminatory functioning of state mechanisms and the consequent lack of support for federal intervention. In Daytona Beach, Florida, the Department's hotline received a complaint of medical neglect of a handicapped infant; immediate contact with the hospital and state agency revealed that "the parents did not consent to surgery" for the infant. *Id.*, at 1648. Notwithstanding this information, which was confirmed by both the hospital and the state agency, and despite the fact that the state agency had "obtained a court order to provide surgery" the day *before* HHS was notified, the Department conducted an on-site investigation. *Ibid.* In the third case, in Colorado Springs, Colorado, the Department intervened so soon after birth that "the decisionmaking process was in progress at the time the OCR [Office of Civil Rights] inquiry began," and "it is impossible to say the surgery would not have been provided without this involvement." *Id.*, at 1649. "However," the Secretary added, "the involvement of OCR and the OCR medical consultant was cooperatively received by the hospital and apparently constructive." *Ibid.*

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[21] The preamble repeatedly makes the assumption that evidence showing the need for *governmental* involvement provides a basis for *federal* involvement. See, *e. g.*, 49 Fed. Reg. 1649 (1984).

In sum, there is nothing in the administrative record to justify the Secretary's belief that "discriminatory withholding of medical care" in violation of § 504 provides any support for federal regulation: In two of the cases (Robinson, Illinois, and Daytona Beach, Florida), the hospital's refusal was based on the absence of parental consent, but the parents' decision was overridden by state authorities and the operation was performed; in the third case (Colorado Springs, Colorado) it is not clear whether the parents would have given their consent or not, but the corrective surgery was in fact performed.[22]

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[22] JUSTICE WHITE's dissent suggests that regulation of health care providers can be justified on a theory the Secretary did not advance—a supposed need to curtail discriminatory advice by biased physicians. See *post*, at 658–661. After observing that at least some handicapped infants have not been treated, the dissent identifies physician attitudes as a likely explanation and concludes that mandated informational notices were presumably designed to "foste[r] an awareness by health care professionals of their responsibility not to act in a discriminatory manner with respect to medical treatment decisions for handicapped infants." *Post*, at 660.

The dissent's theory finds no support in the text of the regulation, the reasoning of the Secretary, or the briefs filed on his behalf in this Court. The regulations in general—and the informational notices in particular—do not purport to place any constraints on the advice that physicians may give their patients. Moreover, since it is now clear that parental decisionmaking is not covered by § 504, *supra*, at 630–631, the dissent's theory rests on the unstated premise that the statute may prevent the giving of advice to do something which § 504 does not itself prohibit. It is hardly obvious that the Rehabilitation Act of 1973 prohibits physicians from "aiding and abet-

VII

As a backstop to his manifestly incorrect perception that withholding of treatment in accordance with parental instructions necessitates federal regulation, the Secretary contends that a hospital's failure to report parents' refusals to consent to treatment violates § 504, and that past breaches of this kind justify federal oversight.

By itself, § 504 imposes no duty to report instances of medical neglect—that undertaking derives from state-law reporting obligations or a hospital's own voluntary practice. Although a hospital's selective refusal to report medical neglect of handicapped infants might violate § 504,[23] the Secretary

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ting" a parental decision which parents admittedly have a right to make. And if Congress did intend this counterintuitive result, one might expect an explanation from the Secretary as to how the hotlines and emergency on-site inspections contemplated by the Final Rules square with the constitutional doctrines on regulation, direct or indirect, of speech in general and of decisionmaking by health professionals in particular.

In reality, the Secretary neither found nor implied that physicians' predispositions against treating handicapped infants had resulted in parental refusals to consent to treatment. Indeed, he principally relied on attitudinal surveys for the converse proposition that regulation is necessary because parents refuse consent to treatment and physicians will "acquiesce in parental refus[als] to treat." 48 Fed. Reg. 30848 (1983). To the extent *any* theory may be discerned in the Secretary's two-column summary of physician surveys, it is that doctors would not *correct* "bad" parental decisions, not that they were responsible for helping them to make such choices in the first place. Moreover, even if the Secretary had relied on this evidence to insinuate that doctors imposed their own value judgments on parents by lobbying them to refuse consent, he never explains that the parental decisionmaking process is one in which doctors exercise the decisive influence needed to force such results. Compare *ibid.*, with *post*, at 658–659. The Secretary, in short, has not even adumbrated a theory of "discrimination" remotely resembling the one invented by the dissent, and therefore has not made the essential connection between the evidence of physician attitudes and the regulatory choice made here.

[23] Of course, § 504 would be violated only if the hospital failed to report medical neglect of a handicapped infant when it would report such neglect of a similarly situated nonhandicapped infant. Because respondents have

has failed to point to any specific evidence that this has occurred. The 49 actual investigations summarized in the preamble to the Final Rules do not reveal *any* case in which a hospital either failed, or was accused of failing, to make an appropriate report to a state agency.[24] Nor can we accept the Solicitor General's invitation to infer discriminatory nonreporting from the studies cited in the Secretary's proposed rulemaking. Even assuming that cases in which parents have withheld consent to treatment for handicapped infants have gone unreported, that fact alone would not prove

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challenged the Secretary's regulations on their face, we have no occasion to address the question whether infants with birth defects are similarly situated with infants in need of blood transfusions (the paradigm case in which hospitals have reported or have sought to override parental decisions, according to the Solicitor General, Brief for Petitioner 28, and n. 16), or whether a hospital could legitimately distinguish between the two situations on the basis of the different risks and benefits inhering in certain operations to correct birth defects, on the one hand, and blood transfusions, on the other hand.

[24] To the contrary, the Secretary's case summaries reveal numerous instances in which hospitals have voluntarily reported instances of suspected medical neglect and have even initiated legal proceedings themselves. In the Bloomington, Indiana, case which prompted these regulations, and in the *University Hospital* case which supported the summary affirmance now before us, the parents' decision was the subject of judicial review in the state courts. In the Robinson, Illinois, case on which the Secretary relies as one of three examples illustrating the need for federal regulation, the hospital reported the parents' refusal to consent to state authorities who arranged for surgery and adoption. 49 Fed. Reg. 1646 (1984). Most dramatically, in the Daytona Beach, Florida, case HHS received its hotline complaint the day *after* the state agency had already obtained a court order overriding the parents' refusal to consent to surgery. *Id.*, at 1648. Notwithstanding the Department's "immediate contact" with the hospital *and the state agency*—which surely must have made it clear that the case had already been reported to that agency and that there was no colorable basis for suspecting a violation of § 504—the Department conducted an on-site investigation. *Ibid.* In the third case on which the Secretary placed special emphasis, the Department intervened before the parents had decided whether to authorize treatment or not, so that no reporting obligation could have been triggered. *Ibid.*

that the hospitals involved had discriminated on the basis of handicap rather than simply failed entirely to discharge their state-law reporting obligations, if any, a matter which lies wholly outside the nondiscrimination mandate of § 504.

The particular reporting mechanism chosen by the Secretary—indeed the entire regulatory framework imposed on state child protective services agencies—departs from the nondiscrimination mandate of § 504 in a more fundamental way. The mandatory provisions of the Final Rules omit any direct requirement that hospitals make reports when parents refuse consent to recommended procedures.[25] Instead, the Final Rules command *state agencies* to require such reports, regardless of the state agencies' own reporting requirements (or lack thereof). 45 CFR § 84.55(c)(1)(i) (1985). Far from merely preventing state agencies from remaining calculatedly indifferent to handicapped infants while they tend to the needs of the similarly situated nonhandicapped, the Final Rules command state agencies to utilize their "full authority" to "prevent instances of unlawful medical neglect of handicapped infants." § 84.55(c)(1). The Rules effectively make medical neglect of handicapped newborns a state investigative priority, possibly forcing state agencies to shift scarce resources away from other enforcement activities—perhaps even from programs designed to protect handicapped children outside hospitals. The Rules also order state agencies to "immediate[ly]" review reports from hospitals, § 84.55(c)(1)(iii), to conduct "on-site investigation[s]," *ibid.*, and to take legal action "to compel the provision of necessary nourishment and medical treatment,"

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[25] The interpretative guidelines appended to the Final Rules do impose on hospitals and other health care providers the duty not to discriminate against handicapped infants in reporting instances of parental neglect. We do not address the question whether reporting, either as a hospital practice or as a requirement of state law, constitutes a "program or activity receiving Federal financial assistance" under § 504. See *Consolidated Rail Corp.* v. *Darrone*, 465 U. S., at 635–636. Cf. *Grove City College* v. *Bell*, 465 U. S. 555, 570–574 (1984).

§ 84.55(c)(1)(iv)—all without any regard to the procedures followed by state agencies in handling complaints filed on behalf of nonhandicapped infants. These operating procedures were imposed over the objection of several state child protective services agencies that the requirement that they turn over reports to HHS "conflicts with the confidentiality requirements of state child abuse and neglect statutes," 49 Fed. Reg. 1627 (1984)—thereby requiring under the guise of nondiscrimination a service which state law denies to the nonhandicapped.[26]

The complaint-handling process the Secretary would impose on unwilling state agencies is totally foreign to the authority to prevent discrimination conferred on him by § 504. "Section 504 seeks to assure evenhanded treatment," *Alexander* v. *Choate*, 469 U. S., at 304; "neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative-action obligation" on recipients of federal financial assistance, *Southeastern Community College* v. *Davis*, 442 U. S. 397, 411 (1979).[27] The Solicitor General also recognizes that § 504 is concerned with discrimination and with discrimination alone. In his attempt to distinguish the Secretary's 1976 determination that it "is beyond the authority of section 504" to promulgate regulations "concerning adequate and appropriate psychiatric care or safe and humane living conditions for persons institutionalized because of handicap or concerning payment of fair compensation to patients who perform work," 41 Fed. Reg. 29548, 29559, the Solicitor General explains:

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[26] JUSTICE WHITE's dissent, quoting the Secretary's explanation for these requirements, concludes that they form, in "substance," a nondiscrimination requirement. *Post*, at 663. This assertion is repetitive, not responsive. The rules governing state child protective services agencies operate independently of any provisions of state law; they go further than them in several respects; they flatly contradict them in others (*e. g.*, confidentiality); and they do not accommodate the revision, modification, or repeal of state laws. To say that the Secretary can give detailed marching orders to state agencies upon discovering that both the agencies and HHS are working toward the same general objective—at least when defined with sufficient abstractness—would countenance a novel and serious intrusion on state autonomy.

[27] See *Southeastern Community College* v. *Davis*, 442 U. S., at 410 (language and structure of 1973 Rehabilitation Act recognizes "the distinction between . . . evenhanded treatment . . . and affirmative efforts").

> "This conclusion of course was consistent with the fact that, as relevant here, Section 504 is essentially concerned only with discrimination in the *relative* treatment of handicapped and nonhandicapped persons and does not confer any *absolute* right to receive particular services or benefits under federally assisted programs." Brief for Petitioner 40, n. 33.

See also 48 Fed. Reg. 30846 (1983) ("Section 504 is in essence an equal treatment, non-discrimination standard").[28]

The Final Rules, however, impose just the sort of absolute obligation on state agencies that the Secretary had previously disavowed. The services state agencies are required to make available to handicapped infants are in no way tied to the level of services provided to similarly situated nonhandicapped infants. Instead, they constitute an "*absolute* right to receive particular services or benefits" under a federally assisted program. Even if a state agency were scrupulously impartial as between the protection it offered handicapped and nonhandicapped infants, it could still be denied federal funding for failing to carry out the Secretary's mission with sufficient zeal.

It is no answer to state, as does the Secretary, that these regulations are a necessary "'metho[d] . . . to give reasonable assurance' of compliance." 49 Fed. Reg. 1627 (1984) (quoting 45 CFR § 80.4(b), which requires state agencies to report on their compliance with Title VI). For while the Secretary can require state agencies to document their *own* compliance with § 504, nothing in that provision authorizes him to commandeer state agencies to enforce compliance by *other* recipients of federal funds (in this instance, hospitals). State child protective services agencies are not field offices of the HHS bureaucracy, and they may not be conscripted against their will as the foot soldiers in a federal crusade.[29] As we stated in *Alexander* v. *Choate*, 469 U. S., at 307, "nothing in the pre- or post-1973 legislative discussion of § 504 suggests that Congress desired to make major inroads on the States' longstanding discretion to choose the proper mix" of services provided by state agencies.

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[28] The Secretary notes that "by enacting section 504 Congress intended to eliminate all of the 'many forms of potential discrimination' against handicapped people through 'the establishment of a broad governmental policy.' S. Rep. No. 1297, 93d Cong., 2d Sess. 38 (1974)." 49 Fed. Reg. 1636 (1984). But no matter how broad the prohibition contained in § 504 may be, what it prohibits is discrimination.

VIII

Section 504 authorizes any head of an Executive Branch agency—regardless of his agency's mission or expertise—to promulgate regulations prohibiting discrimination against the handicapped. See S. Rep. No. 93-1297, pp. 39–40 (1974).[30] As a result of this rulemaking authority, the Secretary of

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[29] Important principles of federalism are implicated by any "federal program that compels state agencies . . . to function as bureaucratic puppets of the Federal Government." *FERC* v. *Mississippi*, 456 U. S. 742, 783 (1982) (opinion of O'CONNOR, J.).

[30] Twenty-seven agencies, including the National Endowment for the Arts, the Nuclear Regulatory Commission, and the Tennessee Valley Authority, have promulgated regulations forbidding discrimination on the basis of handicap in programs or activities receiving federal financial assistance. The Department of Housing and Urban Development has issued a proposed rulemaking. See Jones & Wolfe, Regulations Promulgated Pursuant to Section 504 of the Rehabilitation Act of 1973: A Brief History and Present Status 8–9 (Congressional Research Service, Feb. 28, 1986). There is thus not the same basis for deference predicated on expertise as we found with respect to the Environmental Protection Agency's interpretation of the 1977 Clean Air Act Amendments in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S., at 842–845, and with respect to the Federal Reserve Board's construction of the Bank Holding Act in *Board of Governors, FRS* v. *Investment Company Inst.*, 450 U. S. 46, 56, and n. 21 (1981).

HHS has "substantial leeway to explore areas in which discrimination against the handicapped pos[es] particularly significant problems and to devise regulations to prohibit such discrimination." *Alexander* v. *Choate*, 469 U. S., at 304, n. 24.

Even according the greatest respect to the Secretary's action, however, deference cannot fill the lack of an evidentiary foundation on which the Final Rules must rest. The Secretary's basis for federal intervention is perceived discrimination against handicapped infants in violation of § 504, and yet the Secretary has pointed to no evidence that such discrimination occurs. Neither the fact that regulators generally may rely on generic information in a particular field or comparable experience gained in other fields, nor the fact that regulations may be imposed for preventative or prophylactic reasons, can substitute for evidence supporting the Secretary's own chosen rationale. For the principle of agency accountability recited earlier means that "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Assn.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S., at 50 (citations omitted).[31]

The need for a proper evidentiary basis for agency action is especially acute in this case because Congress has failed to indicate, either in the statute or in the legislative history, that it envisioned federal superintendence of treatment decisions traditionally entrusted to state governance. "[W]e must assume that the implications and limitations of our federal system constitute a major premise of all congressional legislation, though not repeatedly recited therein." *United States* v. *Gambling Devices*, 346 U. S. 441, 450 (1953) (opinion of Jackson, J.).[32] Congress therefore "will not be deemed to have significantly changed the federal-state balance," *United States* v. *Bass*, 404 U. S. 336, 349 (1971)—or to have authorized its delegates to do so—"unless otherwise the purpose of the Act would be defeated," *FTC* v. *Bunte Bros., Inc.*, 312 U. S. 349, 351 (1941).[33] Although the nondiscrimi-

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[31] Accord, *American Textile Mfrs. Institute, Inc.* v. *Donovan*, 452 U. S. 490, 539 (1981); *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156, 168 (1962); *SEC* v. *Chenery Corp.*, 332 U. S. 194, 196 (1947); *SEC* v. *Chenery Corp.*, 318 U. S. 80, 87 (1943).

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[32] See Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 540 (1947) ("The underlying assumptions of our dual form of government, and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits, cut across what might otherwise be the implied range of legislation").

[33] Cf. *Heublein, Inc.* v. *South Carolina Tax Comm'n*, 409 U. S. 275, 281–282 (1972) ("'[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance.'" (quoting *United States* v. *Bass*, 404 U. S., at 349); *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144, 152 (1944) ("Where Congress has not clearly indicated a purpose to precipitate conflict [between federal agencies and state authority] we should be reluctant to do so by decision" (footnote omitted)); *Penn Dairies, Inc.* v. *Milk Control Comm'n*, 318 U. S. 261, 275 (1943) ("An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous"); *FTC* v. *Bunte Bros., Inc.*, 312 U. S., at 354–355 ("The construction of § 5 [of the Federal Trade Commission Act] urged by the Commission would thus give a federal agency pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom or local law. . . . An inroad upon local conditions and local standards of such far-reaching import as is involved here, ought to await a clearer mandate from Congress"); *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 513 (1940) ("The maintenance in our federal system of a proper distribution between state and national governments of police authority and of remedies private and public for public wrongs is of far-reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress"); *United States* v. *Altobella*, 442 F. 2d 310, 313–316 (CA7 1971); 3 C. Sands, Sutherland on Statutory Construction § 62.01, p. 64 (4th ed. 1974) ("[T]he rule of strict construction [of statutes in derogation of sovereignty] serves a quasi-constitutional purpose in our federal system of split sovereignty by helping to secure both levels of sovereign power against encroachment by each other" (footnote omitted)).

The legislative history of the Rehabilitation Act does not support the notion that Congress intended intervention by federal officials into treatment nation mandate of § 504 is cast in language sufficiently broad to suggest that the question is "not one of authority, but of its appropriate exercise[,] [t]he propriety of the exertion of the authority must be tested by its relation to the purpose of the [statutory] grant and with suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear." *Florida* v. *United States*, 282 U. S. 194, 211–212 (1931). Accord, *Chicago, M., St. P. & P. R. Co.* v. *Illinois*, 355 U. S. 300, 306 (1958). That is, "it must appear that there are findings, supported by evidence, of the essential facts . . . which would justify [the Secretary's] conclusion." *Florida* v. *United States*, 282 U. S., at 212. The administrative record does not contain the reasoning and evidence that is necessary to sustain federal intervention into a historically state-administered decisional process that appears—for lack of any evidence to the contrary—to be functioning in full compliance with § 504.

The history of these regulations exposes the inappropriateness of the extraordinary deference—virtually a *carte blanche*—requested by the Government. The Secretary's

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decisions traditionally left by state law to concerned parents and the attending physicians or, in exceptional cases, to state agencies charged with protecting the welfare of the infant. As the Court of Appeals noted, there is nothing in the legislative history that even remotely suggests that Congress contemplated the possibility that "section 504 could or would be applied to treatment decisions, involving defective newborn infants." 729 F. 2d 144, 159 (1984).

"'As far as can be determined, no congressional committee or member of the House or Senate ever even suggested that section 504 would be used to monitor medical treatment of defective newborn infants or establish standards for preserving a particular quality of life. No medical group appeared alert to the intrusion into medical practice which some doctors apprehend from such an undertaking, nor were representatives of parents or spokesmen for religious beliefs that would be affected heard.'" *Id.*, at 158 (quoting *American Academy of Pediatrics* v. *Heckler*, 561 F. Supp., at 401).

present reading of § 504 has evolved only after previous, patently erroneous interpretations had been found wanting.[34] The checkered history of these regulations began in 1982, when the Department notified hospitals that they would violate § 504 if they "allow[ed] an infant" to remain in their care after "the infant's parents or guardian [had withheld consent to] treatment or nourishment discriminatorily." 47 Fed. Reg. 26027. By the time the Proposed Rules were announced one year later, the Secretary had abandoned that construction. But the Department substituted the equally untenable view that "the basic provision of nourishment, fluids, and routine nursing care" was "not an option for medical judgment" and that "[t]he decision to forego medical treatment of a correctable life-threatening defect because an infant also suffers from a permanent irremediable handicap that is not life-threatening, such as mental retardation, is a violation of Section 504," insinuating by omission that lack of parental consent did not alter the hospital's obligation to provide corrective surgery. 48 Fed. Reg. 30852, 30847 (1983). Although the preamble to the Final Rules corrects the prior erroneous signals from the Department that § 504 authorizes it to override parental decisions and to save the lives of handicapped infants, it persists in advocating federal regulation on the basis of treatment denials precipitated by refusals of parental consent and on the ground that its experience with the Baby Doe hotline has demonstrated that "the assumption that handicapped infants will receive medically beneficial treatment is not always justified." 49 Fed. Reg. 1646 (1984).

This response, together with its previous remarks, makes irresistible the inference that the Department regards its mission as one principally concerned with the quality of medical care for handicapped infants rather than with the implementation of § 504. We could not quarrel with a decision by the Department to concentrate its finite compliance resources on instances of life-threatening discrimination rather than instances in which merely elective care has been withheld. Cf. *Heckler* v. *Chaney*, 470 U. S. 821 (1985). But nothing in the statute authorizes the Secretary to dispense with the law's focus on discrimination and instead to employ federal resources to save the lives of handicapped newborns, without regard to whether they are victims of discrimination by recipients of federal funds or not. Section 504 does not authorize the Secretary to give unsolicited advice either to parents, to hospitals, or to state officials who are faced with difficult treatment decisions concerning handicapped children. We may assume that the "qualified professionals" employed by the Secretary may make valuable contributions in particular cases, but neither that assumption nor the sincere conviction that an immediate "on-site investigation" is "necessary to protect the life or health of a handicapped individual" can enlarge the statutory powers of the Secretary.

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[34] The fact that the agency's interpretation "has been neither consistent nor longstanding . . . substantially diminishes the deference to be given to HEW's [now HHS's] present interpretation of the statute." *Southeastern Community College* v. *Davis*, 442 U. S., at 412, n. 11 (citing *General Electric Co.* v. *Gilbert*, 429 U. S. 125, 143 (1976)).

The administrative record demonstrates that the Secretary has asserted the authority to conduct on-site investigations, to inspect hospital records, and to participate in the decisional process in emergency cases in which there was no colorable basis for believing that a violation of § 504 had occurred or was about to occur. The District Court and the Court of Appeals correctly held that these investigative actions were not authorized by the statute and that the regulations which purport to authorize a continuation of them are invalid.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

CHIEF JUSTICE BURGER concurs in the judgment.

JUSTICE REHNQUIST took no part in the consideration or decision of this case.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins and with whom JUSTICE O'CONNOR joins as to Parts I, II, IV, and V, dissenting.

Section 504 of the Rehabilitation Act of 1973 forbids discrimination solely on the basis of handicap in programs or activities receiving federal financial assistance. The issue before us is whether the Secretary of Health and Human Services has any authority under the Act to regulate medical treatment decisions concerning handicapped newborn infants. Relying on its prior decision in *United States* v. *University Hospital*, 729 F. 2d 144 (CA2 1984), the Court of Appeals held that the Secretary was without power in this respect and affirmed a decision of the District Court that § 504 does not extend so far and that the Secretary may not regulate such decisions in any manner.

Although it is my view that we granted certiorari to address this issue, the plurality avoids it by first erroneously reading the decision below as enjoining only the enforcement of specific regulations and by then affirming on the basis that the promulgation of the regulations did not satisfy established principles of administrative law, a matter that the Court of Appeals had no occasion to, and did not, discuss. With all due respect, I dissent.

I

The plurality's initial and fundamental error is its statement that the only question presented here is the specific question whether the four mandatory provisions of the Final Rules issued by the Secretary are authorized by § 504. This conclusion misconstrues the opinion and judgment of the Court of Appeals. The plurality concedes that the District Court's judgment on its face did not stop with enjoining the enforcement of the final regulations. *Ante,* at 625–626, n. 11. In fact, the District Court permanently enjoined the Secretary from implementing the final regulations and also from "continuing or undertaking any other actions to investigate or regulate treatment decisions involving impaired newborn infants taken under authority of Section 504, including pending investigation and other enforcement actions." App. to Pet. for Cert. 51a–52a. This broad injunction ousted the Secretary from the field entirely and granted the precise relief sought by the complaint, which was filed after *University Hospital* and which sought to take full advantage of that decision.[1] The Court of Appeals affirmed and in no way modified the injunction that the District Court had entered. In doing so, the Court of Appeals relied on its previous determination in *University Hospital* that the Secretary had no statutory authority to regulate medical treatment decisions regarding newborn infants. See App. to Pet. for Cert. 2a–3a.[2]

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[1] I disagree with the plurality's conclusion that "[t]he complaints in this case did not challenge the Department's authority to regulate all treatment decisions, but more precisely the mandatory provisions of the Final Rules and enforcement activity along those lines but undertaken pursuant to the Department's 'general authority' to enforce § 504." *Ante,* at 625, n. 11. Although focusing most extensively on the regulations and pending HHS investigations, the complaint specifically cited the *University Hospital* holding that "Section 504 [does] not apply to 'treatment decisions involving defective newborn infants.'" App. 138. The complaint also specifically requested that the District Court "issue a preliminary and permanent injunction prohibiting the defendant from enforcing her final rule embodied in 45 CFR § 84.55, 49 Fed. Reg. 1622, *et seq.* (Jan. 12, 1984), and prohibiting defendant from otherwise acting pursuant to the claimed authority of Section 504 of the Rehabilitation Act of 1973 in regard to the medical treatment of infants with birth defects." *Id.,* at 159. The complaint thus requested both invalidation of the regulations and an injunction against all other actions by the Secretary in this area.

[2] The Court of Appeals' brief order affirming the District Court's judgment, although characterizing that judgment generally as having struck down the regulations, cited *University Hospital* and made no changes in the broad relief awarded by the District Court. The Court of Appeals

It is true that the regulations themselves were invalidated and their enforcement enjoined. This result, however, was directly compelled by the *University Hospital* conclusion that the Secretary was without power to issue any regulations whatsoever that dealt with infants' medical care, and it did not comprise the whole relief awarded by the District Court and affirmed by the Court of Appeals. I thus see no justification for the plurality's distortion of the Court of Appeals' affirmance of the District Court's all-inclusive injunction, which, like *University Hospital,* now represents the law in the Second Circuit.[3] We should resolve the threshold statutory question that this case and *University Hospital* clearly pose--namely, whether the Secretary has any authority at all under the Act to regulate medical care decisions with respect to the handicapped newborn.[4]

II

Section 504 of the Act, which was construed in *University Hospital,* provides:

> "No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title,

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gave absolutely no indication that it was construing the District Court's judgment one whit less broadly than that judgment's language indicated. Nowhere, therefore, is there a justification for the plurality's reconstructive reading of the Court of Appeals' judgment.

[3] I note in this regard that the parties as well do not appear to have contemplated the more limited reading of the judgment below adopted by the plurality. See Brief for Petitioner 9; Brief for Respondents American Hospital Association et al. 4; Brief for Respondents American Medical Association et al. 14.

[4] I would not avoid the issue of the validity of *University Hospital* even if the judgment below were limited to invalidation of these regulations. Given that the judgment below, whether it extends as far as *University Hospital* or not, was based on the *University Hospital* view that *all* regulation of medical treatment decisions is outside the Secretary's § 504 authority because of the nature of those decisions, I believe that the better approach here would be for the Court to determine the correctness of *University Hospital* in any case.

> shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U. S. C. § 794.

After determining that § 706(7), which defines handicapped persons, is not limited to adults and includes the newborn, the Court of Appeals in *University Hospital* construed the "otherwise qualified" language of § 504 to limit the reach of the section to situations in which the handicap is "unrelated to, and thus improper to consideration of, the services in question." 729 F. 2d, at 156.[5] This, concluded the Court of Appeals, would exclude most handicapped newborns because their handicaps are not normally irrelevant to the need for medical services. Furthermore, the Court of Appeals thought that the "otherwise qualified" limitation should not be applied in the "comparatively fluid context of medical treatment decisions" because "[w]here the handicapping condition is related to the condition(s) to be treated, it will rarely, if ever, be possible to say with certainty that a particular decision was 'discriminatory.'" *Id.*, at 156–157.

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[5] The Court of Appeals first addressed and reserved the question whether the hospital or its functions comprised a program or activity receiving federal financial assistance. Noting that this was a fact-specific inquiry, cf. *Grove City College* v. *Bell*, 465 U. S. 555 (1984), the Court of Appeals assumed that the entire hospital was covered by § 504 and proceeded to consider "whether, assuming the entire hospital is covered by section 504, the statute authorizes the type of investigation initiated here." 729 F. 2d, at 151.

I also do not consider whether or under what circumstances hospitals or hospital neonatal programs may constitute programs or activities receiving federal financial assistance. The judgment of the District Court which was affirmed by the Court of Appeals does not set forth guidelines for interpreting this language in this context: It merely enjoins actions directed at such programs or activities. The regulations as well simply adopt the statutory language without interpreting it. Thus, I assume here that the § 504 strictures would be applied only to appropriate programs or activities, and I therefore would leave discussion of this fact-specific issue for further proceedings. I would not now hold that § 504 may never apply on this basis.

Having identified these perceived incongruities between the language of § 504 and the potential regulation of medical decisions regarding handicapped newborns, the Court of Appeals concluded that "[b]efore ruling that congress intended to spawn this type of litigation under section 504, we would want more proof than is apparent from the face of the statute." *Id.*, at 157. Thus, the Court of Appeals turned to the legislative history, where it again found nothing to persuade it that Congress intended § 504 to apply to medical treatment of handicapped infants and hence to enter a field so traditionally occupied by the States. Neither did it consider the current administrative interpretation of § 504 to be a longstanding agency construction calling for judicial deference. In the Court of Appeals' view, therefore, the section was inapplicable to medical treatment decisions regarding the newborn absent some further indication of congressional intent.

I disagree with this conclusion, which the Court of Appeals adhered to in the case before us now. Looking first at the language of the statute, I agree with the Court of Appeals' preliminary conclusion that handicapped newborns are handicapped individuals covered by the Act. There is no reason for importing an age limitation into the statutory definition, and this Court has previously stated that "§ 504 protects handicapped persons of all ages from discrimination in a variety of programs and activities receiving federal financial assistance." *Smith* v. *Robinson*, 468 U. S. 992, 1016–1017 (1984).[6] This leaves the critical question whether a handicapped infant can ever be "otherwise qualified" for medical treatment and hence possibly subjected to unlawful discrimination when he or she is denied such treatment.[7]

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[6] Although infants with birth defects are clearly handicapped individuals covered by § 504, there is one manner in which they may differ from most other handicapped individuals for § 504 purposes. Specifically, they may have a combination of conditions—some of which are medically correctable and some of which are not. In older handicapped individuals, medically correctable conditions may have been corrected so that only irreparable handicapping conditions remain. In a newborn infant, however, both correctable and incorrectable conditions may exist. Thus, since both of these

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may interfere with major life activities, both types of conditions may be considered to be handicaps. In this context, however, it might make more sense to consider as handicaps only those conditions that cannot be medically treated to the point that they will not impair major life activities. For such correctable conditions would not be likely to cause the infant to be regarded as handicapped. In any case, I believe that defining an infant's handicap may well be a delicate problem and one that deserves some consideration.

[7] It would appear that for an infant to be qualified for treatment his or her parents must have consented to such treatment. For the purposes of this discussion of whether the Court of Appeals was correct that medical treatment decisions may *never* be regulated by § 504, I assume that parental consent has been given and that the arguably discriminatory treatment decision is being made by the hospital or doctor. The Court of Appeals in *University Hospital* concentrated on the nature of these decisions in concluding that § 504 may not properly be applied, and I concentrate on that as well. That a situation in which treatment is refused where parental consent has been given may not have been shown to have arisen does not undermine this assumption here. The critical question is whether the operative provisions of § 504 may *ever* apply here given the nature of the decision.

For the purposes of addressing the Court of Appeals' *University Hospital* analysis, the most straightforward fact situation to consider is one in which the benefit provided is the medical treatment itself and in which a hospital refuses treatment in the face of parental consent. In this context, the Court of Appeals' conclusion that the nature of the decisions themselves precludes application of § 504 may be addressed with maximum simplicity. I note, however, that it may well be that the benefits provided by hospitals and doctors and covered by § 504 extend beyond treatment itself. For example, one benefit provided by hospitals and doctors to patients who cannot make their own medical treatment decisions may be medical advice in those patients' best interest to those who must ultimately make the relevant medical treatment decisions. To the extent that the provision of this benefit is a program or activity covered by the statute, I would think that the statute requires that the same advice be given to parents of a handicapped baby as to the parents of a similarly situated nonhandicapped baby. Another benefit provided may be the reporting of nontreatment to the relevant state agency in the case of a parental decision not to treat. Again, It may well be that our prior consideration of this language has implied that the Court of Appeals' construction is correct. In *Southeastern Community College* v. *Davis*, 442 U. S. 397, 406 (1979), we held that "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." This formulation may be read as implying that where a handicapped person meets all of the requirements normally necessary to receive a program's benefits regardless of his or her handicap, he or she is otherwise qualified because that handicap does not interfere with and is thus irrelevant to his or her qualification for the program. Thus, the Court of Appeals' view—that refusing treatment that is called for only because of the handicapping condition cannot constitute discrimination on the basis of handicap since there will be no similarly situated nonhandicapped newborn, *i. e.*, one who needs the same treatment—draws support from our holding in *Davis* since it turns on the same underlying perception that discrimination occurs only when the handicapping condition is irrelevant to the qualification for the program.

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to the extent that the provision of this benefit is a program or activity covered by the statute, see n. 13, *infra*, I would think that § 504 requires that the hospital or doctor report nontreatment of a handicapped baby when it would report the denial of the same treatment for a nonhandicapped baby.

My conclusions in this regard are buttressed by my view of § 504's coverage in the case of a medical treatment decision regarding a black baby. If a hospital or doctor advised different or less efficacious treatment for a black baby than for a white baby, I believe that this would be discrimination under the statute. Similarly, a failure to report a parental decision not to treat because of race would seem to me to be illegally discriminatory—assuming that this decision otherwise came within the statute.

In sum, although these additional situations present the same issue as to when a handicapped baby is otherwise qualified and when such a baby is subjected to discrimination as does the direct example of a refusal to treat and although it may well be that it would be in these contexts that the statute would most likely be given effect, for simplicity's sake I have centered my discussion of *University Hospital* on the refusal-to-treat example.

Even under the Court of Appeals' interpretation of "otherwise qualified," however, it does not follow that § 504 may never apply to medical treatment decisions for the newborn. An esophageal obstruction, for example, would not be part and parcel of the handicap of a baby suffering from Down's syndrome, and the infant would benefit from and is thus otherwise qualified for having the obstruction removed in spite of the handicap. In this case, the treatment is completely unrelated to the baby's handicapping condition. If an otherwise normal child would be given the identical treatment, so should the handicapped child if discrimination on the basis of the handicap is to be avoided.[8]

It would not be difficult to multiply examples like this. And even if it is true that in the great majority of cases the handicap itself will constitute the need for treatment, I doubt that this consideration or any other mentioned by the Court of Appeals justifies the wholesale conclusion that § 504 never applies to newborn infants with handicaps. That some or most failures to treat may not fall within § 504, that discerning which failures to treat are discriminatory may be difficult, and that applying § 504 in this area may intrude into the traditional functions of the State do not support the categorical conclusion that the section may never be applied to medical decisions about handicapped infants. And surely the absence in the legislative history of any consideration of handicapped newborns does not itself narrow the reach of the statutory language. See *Jefferson County Pharmaceutical Assn.* v. *Abbott Laboratories*, 460 U. S. 150, 159–162, and n. 18 (1983). Furthermore, the broad remedial purpose of the section would be undermined by excluding handicapped infants from its coverage; and if, as the plurality indicates, *ante*, at 642–643, the Secretary has substantial leeway to explore areas in which discrimination against the handicapped poses serious problems and to devise regulations to prohibit the discrimination, it is appropriate to take note of the Secretary's present view that § 504 properly extends to the subject matter at issue here. Thus, I believe that the Court of Appeals in *University Hospital* incorrectly concluded that § 504 may never apply to medical treatment decisions concerning handicapped newborn infants. Where a decision regarding medical treatment for a handicapped newborn properly falls within the statutory provision, it should be subject to the constraints set forth in § 504. Consequently, I would reverse the judgment below.

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[8] There are substantial arguments that could be made that the Court of Appeals too narrowly read the statute. It could be argued, for example, that the benefit provided by hospitals is not defined in terms of specific treatments. Rather, the benefit is "general medical care for whatever happens to need treating." If this is the benefit, then a much broader application of the statute in this context is reasonable. Alternatively, even if the benefit is defined more narrowly, "reasonable accommodation" might require more than mere impartial dispensing of identical treatment. See *Alexander* v. *Choate*, 469 U. S. 287, 299–300, and nn. 19, 20 (1985). I need not resolve this issue of the exact meaning of § 504 and *Davis* in this context, however, because my conclusion that *University Hospital*'s broad reasoning was incorrect does not depend on it. Although I do not resolve these issues, I note that while the more expansive interpretations seem consistent with the interpretation adopted by the Secretary in the regulations, the more restrictive one does not. See 45 CFR pt. 84, Appendix C, ¶ (a) (1985).

III

Having determined that the stated basis for the Court of Appeals' holding in *University Hospital* was incorrect and that the decision below cannot be supported by *University Hospital*'s blanket prohibition, I would remand the case to the Court of Appeals. Respondents have, as the plurality's opinion itself demonstrates, raised significant issues aside from the threshold statutory issue presented here. There are, for example, substantial questions regarding the scope of the Secretary's statutory authority in this area and whether these particular regulations are consistent with the statute. I would decline to reach and decide these questions for the first time in this Court without the benefit of the lower courts' deliberations.[9] The plurality, however, has chosen to reach out and address one of those subsidiary issues. Because the plurality has resolved that issue in a manner that I find indefensible on its own terms, I too address it.

The plurality concludes that the four mandatory provisions of the final regulations are invalid because there is no "'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Assn., Inc.* v. *State Farm Mutual Automobile Ins. Co.*, 463 U. S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156, 168 (1962)). The basis for this conclusion is the plurality's perception that two and only two wholly discrete categories of decisions are the object of the final regulations: (1) decisions made by hospitals to treat or not treat where parental consent has been given and (2) decisions made by hospitals to refer or not to refer a case to the state child protective services agency where parental consent has been withheld.[10]

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[9] In addition, although the Secretary did not brief the merits of respondents' claim that the regulations are invalid because arbitrary and capricious, the Secretary did indicate his view that this claim in its current form is not properly in the case and that it is inadequate on its face. See Reply Brief for Petitioner 16, n. 6.

Specifically, the Secretary first asserts that respondents' argument as to the lack of factual basis involving situations in which parents *have* consented to treatment was not raised in the complaint. See App. 146 (challenging lack of showing of instances where "erroneous" parental decisions were made and where medical authorities did not take proper measures under state law). Thus, the Secretary contends that the first major claim addressed and relied on by the plurality was never properly raised. Second, the Secretary contends that these are interpretative regulations that impose no new substantive duties, see 49 Fed. Reg. 1628 (1984), and that no factual basis for their issuance need therefore be given. Cf. 5 U. S. C. § 553(b).

These contentions, although not perhaps representing a procedural bar to our reaching this claim, see *ante*, at 629, n. 14, do provide an additional sign that the plurality's resolution of this case rests on shaky ground.

[10] At this point in the case, as the plurality observes, all parties concerned agree that parental decisions are not included in § 504's application. See *ante*, at 630.

Since the Secretary has not specifically pointed to discriminatory actions that provably resulted from either of these two specific types of decisions, the plurality finds that the Secretary's conclusion that discrimination is occurring is unsupported factually. The plurality's characterization of the Secretary's rationale, however, oversimplifies both the complexity of the situations to which the regulations are addressed and the reasoning of the Secretary.

First, the Secretary's proof that treatment is in fact being withheld from handicapped infants is unquestioned by the plurality. It is therefore obvious that whoever is making them, *decisions* to withhold treatment from such infants are in fact being made. This basic understanding is critical to the Secretary's further reasoning, and the discussion accompanying the proposed regulations clearly indicates that this was the Secretary's starting point. See 48 Fed. Reg. 30847–30848 (1983). Proceeding with this factual understanding, the next question is whether such withholding of treatment constitutes prohibited discrimination under § 504 in some or all situations. It is at this point that the plurality errs. In the plurality's view, only two narrow paradigmatic types of decisions were contemplated by the Secretary as potentially constituting discrimination in violation of the statute. See *ante*, at 628–629. The plurality does not explain, however, precisely what in the Secretary's discussion gives rise to this distillation, and my reading of the explanation accompanying the regulations does not leave me with so limited a view of the Secretary's concerns.

The studies cited by the Secretary in support of the regulations and other literature concerning medical treatment in this area generally portray a decisionmaking process in which the parents and the doctors and often other concerned persons as well are involved—although the parental decision to consent or not is obviously the critical one.[11] Thus, the parental consent decision does not occur in a vacuum. In fact, the doctors (directly) and the hospital (indirectly) in most cases participate in the formulation of the final parental decision and in many cases substantially influence that decision.[12] Consequently, discrimination against a handicapped infant may assume guises other than the outright refusal to treat once parental consent has been given. Discrimination may occur when a doctor encourages or fails to discourage a parental decision to refuse consent to treatment for a handicapped child when the doctor would discourage or actually oppose a parental decision to refuse consent to the same treatment for a nonhandicapped child. Or discrimination may occur when a doctor makes a discriminatory treatment recommendation that the parents simply follow. Alternatively, discrimination may result from a hospital's explicit laissez-faire attitude about this type of discrimination on the part of doctors.

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[11] See, *e. g.*, Duff & Campbell, Moral and Ethical Dilemmas in the Special-Care Nursery, 289 N. Eng. J. Med. 890 (1973). See also Gross,

Contrary to the plurality's constrained view of the Secretary's justification for the regulations, the stated basis for those regulations reveals that the Secretary was cognizant of this more elusive discrimination. For example, the evidence cited most extensively by the Secretary in his initial proposal of these regulations was a study of attitudes of practicing and teaching pediatricians and pediatric surgeons. See 48 Fed. Reg. 30848 (1983) (citing Shaw, Randolph, & Manard, Ethical Issues in Pediatric Surgery: A National Survey of Pediatricians and Pediatric Surgeons, 60 Pediatrics 588 (1977)). This study indicated that a substantial number of these doctors (76.8% of pediatric surgeons and 49.5% of pedi-

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Cox, Tatyrek, Pollay, & Barnes, Early Management and Decision Making for the Treatment of Myelomeningocele, 72 Pediatrics 450 (1983).

[12] Presumably, the program or activity that § 504 would apply to in this context would be the hospital's neonatal program of medical care or the hospital's program of medical care generally. In either case, actions of both doctors and hospitals that cause or permit discriminatory decisions that are taken as part of the program or activity would be subject to § 504's constraints.

atricians) would "acquiesce in parents' decision to refuse consent for surgery in a newborn with intestinal atresia if the infant also had . . . Down's syndrome." *Id.*, at 590. It also indicated that a substantial minority (23.6% of pediatric surgeons and 13.2% of pediatricians) would in fact encourage parents to refuse consent to surgery in this situation and that only a small minority (3.4% of pediatric surgeons and 15.8% of pediatricians) would attempt to get a court order mandating surgery if the parents refused consent. In comparison, only a small minority (7.9% of pediatric surgeons and 2.6% of pediatricians) would acquiesce in parental refusal to treat intestinal atresia in an infant with no other anomaly. And a large majority (78.3% of pediatric surgeons and 88.4% of pediatricians) would try to get a court order directing surgery if parental consent were withheld for treatment of a treatable malignant tumor. The Secretary thus recognized that there was evidence that doctors would act differently in terms of attempts to affect or override parental decisions depending on whether the infant was handicapped.

Based on this evidence, the Secretary conceded that "[t]he full extent of discriminatory and life-threatening practices toward handicapped infants is not yet known" but concluded "that for even a single infant to die due to lack of an adequate notice and complaint procedure is unacceptable." 48 Fed. Reg. 30847 (1983). Thus, the Secretary promulgated the regulations at issue here. These regulations, in relevant part, require that a notice of the federal policies against discrimination on the basis of handicap be posted in a place where a hospital's health care professionals will see it. This requirement is, as the Secretary concluded, "[c]onsistent with the Department's intent to target the notice to nurses and other health care professionals." App. 25. The notice requirement, therefore, may reasonably be read as aimed at fostering an awareness by health care professionals of their responsibility not to act in a discriminatory manner with respect to medical treatment decisions for handicapped infants.

The second requirement of the regulations, that state agencies provide mechanisms for requiring and reporting medical neglect of handicapped children, is also consistent with the Secretary's focus on discrimination in the form of discriminatory reporting.[13]

I therefore perceive a rational connection between the facts found by the Secretary and the regulatory choice made. The Secretary identified an existing practice that there was reason to believe resulted from discrimination on the basis of handicap. Given this finding, the amorphous nature of much of the possible discrimination, the Secretary's profession that the regulations are appropriate no matter how limited the problem,[14] and the focus of the regulations on loci where unlawful discrimination seems most likely to occur and on persons likely to be responsible for it, I conclude that these regulations are not arbitrary and capricious and that the Court errs in striking them down on that basis. Although the Secretary's path here may be marked with "'less than ideal clarity,'" we will uphold such a decision "'if the agency's path may reasonably be discerned.'" *Motor Vehicles Mfrs. Assn.*, 463 U. S., at 43 (quoting *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U. S. 281, 286 (1974)).

The plurality also objects to the regulations' requirement concerning the state protective agencies' reporting procedures on another ground. Specifically, the plurality finds that this requirement is in fact a substantive prescription rather than a prohibition of discrimination. The plurality bases this conclusion on the fact that the regulation sets forth specific procedures that must be adopted by state agencies.

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[13] The plurality reserves the question whether reporting would be a program or activity receiving federal financial assistance, *ante*, at 639, n. 25, and I follow that course.

[14] The plurality itself says that "regulations may be imposed for preventative or prophylactic reasons," *ante*, at 643, but concludes that the Secretary here proceeded based on the perception of an actual problem rather than a need for prophylactic rules. To me, however, the Secretary's statement that the rules are appropriate if necessary for even one problem situation makes the plurality's distinction in this respect questionable: The line between a prophylactic rule and a rule that draws its justification from the likely existence of even one unlawful action seems to me a very fine one.

The plurality's conclusion disregards the Secretary's explanation for this requirement. In the preamble to the proposed regulations, the Secretary explicitly stated:

> "The Department has determined that under every state's law, failure of parents to provide necessary, medically indicated care to a child is either explicitly cited as grounds for action by the state to compel treatment or is implicitly covered by the state statute. These state statutes also provide for appropriate administrative and judicial enforcement authorities to prevent such instances of medical neglect, including requirements that medical personnel report suspected cases to the state child protective services agency, agency access to medical files, immediate investigations and authority to compel treatment." 48 Fed. Reg. 30848 (1983).

This finding was repeated in the statement accompanying the final regulations:

> "Although there are some variations among state child protective statutes, all have the following basic elements: a requirement that health care providers report suspected cases of child abuse or neglect, including medical neglect; a mechanism for timely receipt of such reports; a process for administrative inquiry and investigation to determine the facts; and the authority and responsibility to seek an appropriate court order to remedy the apparent abuse and neglect, if it is found to exist." 49 Fed. Reg. 1627 (1984).

The regulations, in turn, require that the State provide these same services with respect to medical neglect of handicapped infants. See 45 CFR § 84.55(c) (1985). The only additional requirements imposed by the regulations involve provisions enabling the Department itself to review for compliance with the nondiscrimination requirements. Consequently, the regulations simply track the existing state procedures found to exist by the Secretary, requiring that funded state agencies provide those same procedures for handicapped children. The fact that the regulations specify the procedures that are necessary to ensure an absence of discrimination and do not instead speak in "nondiscrimination" terms is irrelevant. The substance of the requirement is nondiscrimination. The plurality's conclusion in this regard, however, apparently rests on a determination that implementation of a nondiscrimination mandate may be accomplished in only one form—even if the same result may be accomplished by another route. See *ante*, at 640, n. 26. I would not elevate regulatory form over statutory substance in this manner. In sum, the plurality's determination that the regulations were inadequately supported and explained as a matter of administrative law does not withstand examination of the Secretary's discussion of the underlying problem and of the contours of the regulations themselves.

IV

My disagreement with the plurality in this case does not end here, however. For even under its chosen rationale, I find its ultimate conclusion dubious. Having assiduously restricted its discussion to the validity of the regulations only, the plurality ends up concluding expansively that not only the regulations but also other investigations taken by the Secretary independent of the regulations are invalid. Thus, the Court apparently enjoins the Secretary's on-site investigations as well as "the regulations which purport to authorize a continuation of them." *Ante*, at 647. And the plurality rests this action on the conclusion that the lower courts "correctly held that these investigative actions were not authorized by the statute." *Ibid.*

I am at a loss to understand the plurality's reasoning in this respect. In construing the judgment below, the plurality appears to conclude that, although the injunction entered by the District Court and affirmed by the Court of Appeals did not purport to prohibit *all* actions by the Secretary under the statute, the injunction did in fact extend beyond merely these particular regulations. Thus, the plurality indicates that the judgment below applied as well to actions that "resemble," "parallel," or are "along [the] lines [of]" the regulations. *Ante,* at 625–626, n. 11. The plurality further defines what actions it believes the Court of Appeals and District Court contemplated: "[T]he injunction forbids continuation or initiation of regulatory and investigative activity directed at instances in which parents have refused consent to treatment and, if the Secretary were to undertake such action, efforts to seek compliance with affirmative requirements imposed on state child protective services agencies." *Ante,* at 625, n. 11.

Aside from the fact that I see absolutely nothing in either the District Court's or the Court of Appeals' judgment that would support a constrained reading of the broadly phrased relief awarded by the District Court and affirmed without modification by the Court of Appeals,[15] I have some doubt as to how different the Court's holding today is from a holding that § 504 gives HHS no authority whatsoever over decisions to treat handicapped infants. The plurality's lack of coherence on this crucial point raises substantial doubts as to the reach of the holding and as to the basis for that holding.

Finally, I am puzzled as to how and why the plurality's determination that the regulations are invalid because they are arbitrary and capricious extends to other actions not taken under the regulations. The plurality apparently would enjoin all enforcement actions by the Secretary in situations in which parents have refused to consent to treatment. See *ante,* at 625–626, n. 11. Yet it is not clear to me that the plurality's basis for invalidating these regulations would extend to all such situations. I do not see, for example, why the plurality's finding that the Secretary did not adequately support his conclusion that failures to report refusals to treat likely result from discrimination means that such a conclusion will *never* be justified. The Secretary might be able to prove that a particular hospital generally fails to report nontreatment of handicapped babies for a specific treatment where it reports nontreatment of nonhandicapped babies for the same treatment. In essence, a determination that these regulations were inadequately supported factually would not seem to be properly extended beyond actions taken pursuant to these regulations: The fact that the Secretary has not adequately justified generalized action under the regulations should not mean that individualized action in appropriate circumstances is precluded.

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[15] See nn. 1–2, *supra,* and accompanying text.

V

In sum, the plurality today mischaracterizes the judgment below and, based on that mischaracterization, is sidetracked from the straightforward issue of statutory construction that this case presents. The plurality incorrectly resolves an issue that was not fully addressed by the parties, gives no guidance to the Secretary or the other parties as to the proper construction of the governing statute, and fails adequately to explain the precise scope of the holding or how that holding is supported under the plurality's chosen rationale. From this misguided effort, I dissent.

JUSTICE O'CONNOR, dissenting.

I fully agree with JUSTICE WHITE's conclusion that the only question properly before us is whether the Court of Appeals correctly concluded that the Secretary has no power under 29 U. S. C. § 794 to regulate medical treatment decisions concerning handicapped newborn infants. I also agree that application of established principles of statutory construction and of the appropriate standard for judicial review of agency action leads inescapably to the conclusion that the Secretary has the authority to regulate in this area. Because, however, I see no need at this juncture to address the details of the regulations or to assess whether they are sufficiently rational to survive review under 5 U. S. C. § 706 (2)(A), I join only parts I, II, IV, and V of JUSTICE WHITE's dissent.

BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* MICHIGAN ACADEMY OF FAMILY PHYSICIANS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 85-225. Argued January 22, 1986—Decided June 9, 1986

Respondents, who include an association of family physicians and several individual doctors, filed suit in Federal District Court to challenge the validity of a regulation that was promulgated under Part B of the Medicare program and that authorizes the payment of benefits in different amounts for similar physicians' services. Holding that the regulation contravened several statutory provisions governing the Medicare program, the court rejected the Secretary of Health and Human Services' contention (the question presented in this Court) that Congress has forbidden judicial review of all questions affecting the amount of benefits payable under Part B of the Medicare program. The Court of Appeals agreed.

Held: In neither 42 U. S. C. § 1395ff (1982 ed. and Supp. II) nor § 1395ii (1982 ed., Supp. II), has Congress barred judicial review of regulations promulgated under Part B of the Medicare program. Pp. 670–682.

(a) There is a strong presumption that Congress intends judicial review of administrative action. Only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review. Pp. 670–673.

(b) The provisions of § 1395ff(b) that authorize administrative and judicial review of determinations as to the amount of benefits under Part A of the Medicare program do not impliedly foreclose judicial review of Part B regulations. The reticulated statutory scheme, which details the forum and limits of review of determinations of the amounts of benefits payable under Parts A and B, simply does not speak to challenges as to the *method* by which such amounts are to be determined rather than the *determinations* themselves. That Congress did not preclude review of the method by which Part B awards are computed (as opposed to the computation) is supported by the legislative history. *United States* v. *Erika, Inc.*, 456 U. S. 201, explained. Pp. 674–678.

(c) Nor does § 1395ii, which states that 42 U. S. C. § 405(h) (1982 ed., Supp. II), along with other provisions of the Social Security Act, shall be applicable to the Medicare program, preclude judicial review here. Regardless of the abstract meaning of § 405(h), which prohibits certain actions against the Government or its officers, that section does not apply on its own terms to Part B, but is instead incorporated *mutatis mutandis* by § 1395ii. The legislative history of the Medicare program provides specific evidence of Congress' intent to foreclose review only of "amount determinations," not of substantial statutory and constitutional challenges to the Secretary's administration of Part B. Pp. 678–681.

757 F. 2d 91, affirmed.

STEVENS, J., delivered the opinion of the Court, in which all other Members joined, except REHNQUIST, J., who took no part in the consideration or decision of the case.

Edwin S. Kneedler argued the cause for petitioners. With him on the briefs were *Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Geller,* and *Anthony J. Steinmeyer.*

Alan G. Gilchrist argued the cause and filed a brief for respondents.*

JUSTICE STEVENS delivered the opinion of the Court.

The question presented in this case is whether Congress, in either § 1395ff or § 1395ii of Title 42 of the United States Code, barred judicial review of regulations promulgated under Part B of the Medicare program.

Respondents, who include an association of family physicians and several individual doctors, filed suit to challenge the validity of 42 CFR § 405.504(b) (1985), which authorizes the payment of benefits in different amounts for similar physicians' services. The District Court held that the regulation contravened several provisions of the statute governing the Medicare program:

> "There is no basis to justify the segregation of allopathic family physicians from all other types of physicians. Such segregation is not rationally related to any legitimate purpose of the Medicare statute. To lump MDs who are family physicians, but who have chosen not

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**Jack R. Bierig* filed a brief for the American Medical Association as *amicus curiae* urging affirmance.

> to become board certified family physicians for whatever motive, with chiropractors, dentists, and podiatrists for the purpose of determining Medicare reimbursement defies all reason." *Michigan Academy of Family Physicians* v. *Blue Cross and Blue Shield of Michigan,* 502 F. Supp. 751, 755 (ED Mich. 1980).

Because it ruled in favor of respondents on statutory grounds, the District Court did not reach their constitutional claims. See *id.*, at 756. The Court of Appeals agreed with the District Court that the Secretary's regulation was "obvious[ly] inconsisten[t] with the plain language of the Medicare statute" and held that "this regulation is irrational and is invalid." *Michigan Academy of Family Physicians* v. *Blue Cross and Blue Shield of Michigan,* 728 F. 2d 326, 332 (CA6 1984). Like the District Court, it too declined to reach respondents' constitutional claims. See *id.*, at 332, n. 5.

The Secretary of Health and Human Services has not sought review of the decision on the merits invalidating the regulation. Instead, he renews the contention, rejected by both the District Court and the Court of Appeals, that Congress has forbidden judicial review of all questions affecting the amount of benefits payable under Part B of the Medicare program. Because the question is important and has divided the Courts of Appeals,[1] we granted the petition for a writ of certiorari.[2] We now affirm.

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[1] The Court of Appeals for the Fourth Circuit, in conflict with the Court of Appeals for the Sixth Circuit, has held that regulations promulgated under Part B of the Medicare program are insulated from judicial review. See *Starnes* v. *Schweiker,* 748 F. 2d 217, 218 (1984) *(per curiam),* cert. denied, 471 U. S. 1017 (1985).

[2] In fact, we did so twice. We first granted the petition for a writ of certiorari to allow the Court of Appeals to consider its jurisdictional ruling in the light of *Heckler* v. *Ringer,* 466 U. S. 602 (1984). 467 U. S. 1223 (1984). On remand, the Court of Appeals ultimately decided to reinstate its original judgment, see *Michigan Academy of Family Physicians* v. *Blue Cross and Blue Shield of Michigan,* 757 F. 2d 91 (1985); *Michigan Academy of Family Physicians* v. *Blue Cross and Blue Shield of Michi-*

I

We begin with the strong presumption that Congress intends judicial review of administrative action. From the beginning "our cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967) (citing cases). See generally L. Jaffe, Judicial Control of Administrative Action 339–353 (1965). In *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803), a case itself involving review of executive action, Chief Justice Marshall insisted that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws." Later, in the lesser known but nonetheless important case of *United States* v. *Nourse*, 9 Pet. 8, 28–29 (1835), the Chief Justice noted the traditional observance of this right and laid the foundation for the modern presumption of judicial review:

> "It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process . . . leaving to the debtor no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States."

Committees of both Houses of Congress have endorsed this view. In undertaking the comprehensive rethinking of the place of administrative agencies in a regime of separate and

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gan, 751 F. 2d 809 (1984), whereupon we issued the writ on which the judgment is now before us. 474 U. S. 815 (1985).

divided powers that culminated in the passage of the Administrative Procedure Act (APA), 5 U. S. C. §§551–559, 701–706, the Senate Committee on the Judiciary remarked:

> "Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board." S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945).

Accord, H. R. Rep. No. 1980, 79th Cong., 2d Sess., 41 (1946). The Committee on the Judiciary of the House of Representatives agreed that Congress ordinarily intends that there be judicial review, and emphasized the clarity with which a contrary intent must be expressed:

> "The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases. To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review." *Ibid.*

Taking up the language in the House Committee Report, Justice Harlan reaffirmed the Court's holding in *Rusk* v. *Cort*, 369 U. S. 367, 379–380 (1962), that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories* v. *Gardner*, 387 U. S., at 141 (citations omitted). This standard has been invoked time and again when considering whether the Secretary has discharged "the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of his decision," *Dunlop* v. *Bachowski*, 421 U. S. 560, 567 (1975).[3]

Subject to constitutional constraints, Congress can, of course, make exceptions to the historic practice whereby courts review agency action. The presumption of judicial review is, after all, a presumption, and "like all presumptions used in interpreting statutes, may be overcome by," *inter alia*, "specific language or specific legislative history that is a reliable indicator of congressional intent," or a specific congressional intent to preclude judicial review that is "'fairly discernible' in the detail of the legislative scheme." *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 349, 351 (1984).[4]

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[3] See, *e. g.*, *Lindahl* v. *Office of Personnel Management*, 470 U. S. 768, 778 (1985); *Dunlop* v. *Bachowski*, 421 U. S., at 567; *Citizens to Preserve Overton Park* v. *Volpe*, 401 U. S. 402, 410 (1971); *Barlow* v. *Collins*, 397 U. S. 159, 166–167 (1970) ("Indeed, judicial review of such administrative action is the rule, and nonreviewability an exception which must be demonstrated"). See also *Wong Wing Hang* v. *INS*, 360 F. 2d 715, 718 (CA2 1966) (Friendly, J.) ("[O]nly in the rare—some say non-existent—case . . . may review for 'abuse' be precluded"). Of course, this Court has "never applied the 'clear and convincing evidence' standard in the strict evidentiary sense"; nevertheless, the standard serves as "a useful reminder to courts that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling." *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 350–351 (1984).

A strong presumption finds support in a wealth of scholarly literature. See, *e. g.*, 2 K. Davis, Administrative Law § 9:6, p. 240 (1979) (praising "the case law since 1974" for being "strongly on the side of reviewability"); L. Jaffe, Judicial Control of Administrative Action 327 (1965) ("An agency is not an island entire of itself. It is one of the many rooms in the magnificent mansion of the law. The very subordination of the agency to judicial jurisdiction is intended to proclaim the premise that each agency is to be brought into harmony with the totality of the law, the law as it is found in the statute at hand, the statute book at large, the principles and conceptions of the 'common law,' and the ultimate guarantees associated with the Constitution"); B. Schwartz, Administrative Law § 8.1, p. 436 (2d ed. 1984) ("The responsibility of enforcing the limits of statutory grants of authority is a judicial function; . . . [w]ithout judicial review, statutory limits would be naught but empty words"); Jaffe, The Right to Judicial Review I, 71 Harv. L. Rev. 401, 432 (1958) ("[J]udicial review is the rule. . . . It is a basic right; it is a traditional power and the intention to exclude it must be made specifically manifest"); Shapiro, Administrative Discretion: The Next Stage, 92 Yale L. J. 1487, 1489, n. 11 (1983) (since passage of the APA, the sustained effort of administrative law has been to "continuously narro[w] the category of actions considered to be so discretionary as to be exempted from review").

In this case, the Government asserts that two statutory provisions remove the Secretary's regulation from review under the grant of general federal-question jurisdiction found in 28 U. S. C. § 1331. First, the Government contends that 42 U. S. C. § 1395ff(b) (1982 ed., Supp. II), which authorizes "Appeal by individuals," impliedly forecloses administrative or judicial review of any action taken under Part B of the Medicare program by failing to authorize such review while simultaneously authorizing administrative and judicial review of "any determination . . . as to . . . the amount of benefits under part A," § 1395ff(b)(1)(C). Second, the Government asserts that 42 U. S. C. § 1395ii (1982 ed., Supp. II), which makes applicable 42 U. S. C. § 405(h) (1982 ed., Supp. II), of the Social Security Act to the Medicare program, expressly precludes all administrative or judicial review not otherwise provided in that statute. We find neither argument persuasive.

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[4] "The congressional intent necessary to overcome the presumption may also be inferred from contemporaneous judicial construction barring review and the congressional acquiescence in it, see, *e. g.*, *Ludecke* v. *Watkins*, 335 U. S. 160 (1948), or from the collective import of legislative and judicial history behind a particular statute, see, *e. g.*, *Heikkila* v. *Barber*, 345 U. S. 229 (1953). More important for purposes of this case, the presumption favoring judicial review of administrative action may be overcome by inferences of intent drawn from the statutory scheme as a whole. See, *e. g.*, *Morris* v. *Gressette*, 432 U. S. 491 (1977); *Switchmen* v. *National Mediation Board*, 320 U. S. 297 (1943)." *Block* v. *Community Nutrition Institute*, 467 U. S., at 349.

II

Section 1395ff on its face is an explicit authorization of judicial review, not a bar.[5] As a general matter, "'[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent.'" *Abbott Laboratories* v. *Gardner*, 387 U. S., at 141 (quoting L. Jaffe, Judicial Control of Administrative Action 357 (1965)). See *Barlow* v. *Collins*, 397 U. S. 159, 166 (1970); *Stark* v. *Wickard*, 321 U. S. 288, 309 (1944).

In the Medicare program, however, the situation is somewhat more complex. Under Part B of that program, which is at issue here, the Secretary contracts with private health insurance carriers to provide benefits for which individuals voluntarily remit premiums. This optional coverage, which is federally subsidized, supplements the mandatory institutional health benefits (such as coverage for hospital expenses) provided by Part A. Subject to an amount-in-controversy requirement, individuals aggrieved by delayed or insufficient payment with respect to benefits payable under Part B are afforded an "opportunity for a fair hearing by the *carrier*," 42 U. S. C. § 1395u(b)(3)(C) (emphasis added); in comparison, and subject to a like amount-in-controversy requirement, a similarly aggrieved individual under Part A is entitled "to a hearing thereon by the *Secretary* . . . and to judicial review," 42 U. S. C. §§ 1395ff(b)(1)(C), (b)(2) (1982 ed. and Supp. II). "In the context of the statute's precisely drawn provisions," we held in *United States* v. *Erika, Inc.*, 456 U. S. 201, 208 (1982), that the failure "to authorize further review for determinations of the amount of Part B awards . . . provides persuasive evidence that Congress deliberately intended to foreclose further review of such claims." Not limiting our consideration to the statutory text, we investigated the legislative history which "confirm[ed] this view," *ibid.*, and disclosed a purpose to "'avoid overloading the courts'" with "'trivial matters,'" a consequence which would "'unduly ta[x]'" the federal court system with "'little real value'" to be derived by participants in the program, *id.*, at 210, n. 13 (quoting 118 Cong. Rec. 33992 (1972) (remarks of Sen. Bennett)).

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[5] The pertinent text of § 1395ff reads as follows:

"(a) Entitlement to and amount of benefits

"The determination of whether an individual is entitled to benefits under part A or part B, and the determination of the amount of benefits under part A, shall be made by the Secretary in accordance with regulations prescribed by him.

"(b) Appeal by individuals

"(1) Any individual dissatisfied with any determination under subsection (a) of this section as to—

"(A) whether he meets the conditions of section 426 or section 426a of this title [which set forth eligibility requirements to be satisfied before an individual is permitted to participate in Part A of the Medicare program], or

"(B) whether he is eligible to enroll and has enrolled pursuant to the provisions of part B of [the Medicare program] . . . , or,

"(C) the amount of the benefits under part A (including a determination where such amount is determined to be zero)

shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in section 405(b) of this title and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title."

Respondents' federal-court challenge to the validity of the Secretary's regulation is not foreclosed by § 1395ff as we construed that provision in *Erika*. The reticulated statutory scheme, which carefully details the forum and limits of review of "any determination . . . of . . . the amount of benefits under part A," 42 U. S. C. § 1395ff(b)(1)(C) (1982 ed., Supp. II), and of the "amount of . . . payment" of benefits under Part B, 42 U. S. C. § 1395u(b)(3)(C), simply does not speak to challenges mounted against the *method* by which such amounts are to be determined rather than the *determinations* themselves. As the Secretary has made clear, "the legality, constitutional or otherwise, of any provision of the Act or regulations relevant to the Medicare Program" is not considered in a "fair hearing" held by a carrier to resolve a grievance related to a determination of the amount of a Part B award.[6] As a result, an attack on the validity of a regulation is not the kind of administrative action that we described in *Erika* as an "amount determination" which decides "the amount of the Medicare payment to be made on a particular claim" and with respect to which the Act impliedly denies judicial review. 456 U. S., at 208.

That Congress did not preclude review of the method by which Part B awards are computed (as opposed to the computation) is borne out by the very legislative history we found persuasive in *Erika.* The Senate Committee Report on the original 1965 legislation reveals an intention to preclude "judicial review of a determination concerning the *amount of benefits* under part B where claims will probably be for substantially smaller amounts than under part A." S. Rep. No. 404, 89th Cong., 1st Sess., 54–55 (1965) (emphasis added). The Report makes plain that "carriers, not the Secretary, would review beneficiary complaints regarding the *amount of benefits.*" *Ibid.* (emphasis added). Accord, H. R. Rep. No. 213, 89th Cong., 1st Sess., 47 (1965) ("Under the supplementary plan [Part B], carriers, not the Secretary, would review beneficiary complaints regarding the *amount of benefits*" (emphasis added)). The legislative history of the pertinent 1972 amendment likewise reveals that judicial review was precluded only as to controversies regarding determinations of amounts of benefits. The Conference Report on the 1972 amendment explains that "there is no authorization for an appeal to the Secretary or for judicial review on matters *solely involving amounts of benefits under Part B.*" H. R. Conf. Rep. No. 92–1605, p. 61 (1972) (emphasis added). Senator Bennett's introductory explanation to the amendment confirms that preclusion of judicial review of Part B awards—designed "to avoid overloading the courts with quite minor matters"—embraced only "decisions on a claim for payment for a given service." 118 Cong. Rec. 33992 (1972). The Senator feared that "[i]f judicial review is made available where any claim is denied, as some court decisions have held, the resources of the Federal court system would be unduly taxed and little real value would be derived by the enrollees. The proposed amendment would merely clarify the original intent of the law and prevent the overloading of the courts with trivial matters because the intent is considered unclear." *Ibid.* As we found in *Erika*, 456 U. S., at 206, Congress has precluded judicial review only "of adverse hearing officer determinations of the amount of Part B payments."[7]

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[6] Medicare Carrier's Manual § 12016 (1985). In a "fair hearing" conducted pursuant to § 1395u(b)(3)(C), see 42 CFR § 405.820 (1985), the carrier designates a hearing officer, § 405.823, whose jurisdiction is circumscribed by regulation as follows:

"The hearing officer in exercising the authority to conduct a hearing under section 1842(b)(3)(C) of the Act is to comply with all the provisions of title XVIII of the Act and regulations issued thereunder, as well as with policy statements, instructions, and other guides issued by the Health Care Financing Administration in accordance with the Secretary's agreement with the carriers." § 405.860.

One of those guides is a compilation of instructions prepared by the Secretary and entitled the "Carrier's Manual." Section 12016 of the Manual, part of which is quoted in text, provides as follows:

"Authority—the HO [Hearing Officer] occupies a significant position in the administration appeals process. Authority of the HO is limited to the extent that he must comply with all provisions of title XVIII of the Act and regulations issued thereunder, as well as with HCFA. The HO may not overrule the provisions of the law or interpret them in a way different than HCFA does when he disagrees with their intent; nor may he use hearing decisions as a vehicle for commenting upon the legality, constitutional or otherwise, of any provision of the Act or regulations relevant to the Medicare Program."

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[7] The fourth footnote of our opinion in *Heckler* v. *Ringer*, 466 U. S., at 608–609, n. 4, on which the Government relies for the proposition that Part B challenges are never cognizable in a judicial forum, merely declined to review "claims for Part B benefits." *Id.*, at 609, n. 4. The single sen-

Careful analysis of the governing statutory provisions and their legislative history thus reveals that Congress intended to bar judicial review only of determinations of the amount of benefits to be awarded under Part B. Congress delegated this task to carriers who would finally determine such matters in conformity with the regulations and instructions of the Secretary. We conclude, therefore, that those matters which Congress did *not* leave to be determined in a "fair hearing" conducted by the carrier—including challenges to the validity of the Secretary's instructions and regulations—are not impliedly insulated from judicial review by 42 U. S. C. § 1395ff (1982 ed. and Supp. II).

III

In light of Congress' express provision for carrier review of millions of what it characterized as "trivial" claims, it is implausible to think it intended that there be *no* forum to adjudicate statutory and constitutional challenges to regulations promulgated by the Secretary. The Government nevertheless maintains that this is precisely what Congress intended to accomplish in 42 U. S. C. § 1395ii (1982 ed., Supp. II). That section states that 42 U. S. C. § 405(h) (1982 ed., Supp. II), along with a string citation of 10 other provisions of Title II of the Social Security Act, "shall also apply with respect to this subchapter to the same extent as they are applicable with respect to subchapter II of this chapter." Section 405(h), in turn, reads in full as follows:

> "(h) Finality of Secretary's decision

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tence in which we disposed of respondents' claim rested entirely on *Erika* and its companion case of *Schweiker* v. *McClure*, 456 U. S. 188 (1982). (*Schweiker* upheld the constitutionality of "fair hearing" proceedings conducted by private insurance carriers against a Due Process Clause attack.) We did not, in that single sentence, extend the preclusion of judicial review beyond the Part B "amount determinations" with which both *Erika* and that part of the *Ringer* opinion were concerned.

> "The findings and decision of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 1331 or 1346 of title 28 to recover on any claim arising under this subchapter."

The Government contends that the third sentence of § 405(h) by its terms prevents any resort to the grant of general federal-question jurisdiction contained in 28 U. S. C. § 1331.[8] It finds support for this construction in *Weinberger* v. *Salfi*, 422 U. S. 749, 756–762 (1975), and *Heckler* v. *Ringer*, 466 U. S. 602, 614–616, 620–626 (1984). Respondents counter that the dispositions in these two cases are consistent with the view that Congress' purpose was to make clear that whatever specific procedures it provided for judicial review of final action by the Secretary were exclusive, and could not be circumvented by resort to the general jurisdiction of the federal courts.[9] Cf. *Weinberger* v. *Salfi*, 422 U. S., at 764–765; *Heckler* v. *Ringer*, 466 U. S., at 621–622.

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[8] The Government also argues that the challenged regulation is a "decision of the Secretary" which the second sentence of § 405(h) excepts from "revie[w] by any . . . tribunal." The Government's assumption that the regulation is such a decision, however, ignores the contextual definition of "decision" in the first sentence as those determinations made by "the Secretary after a hearing." The purpose of "the first two sentences of § 405(h)," as we made clear in *Weinberger* v. *Salfi*, 422 U. S. 749, 757 (1975), is to "assure that administrative exhaustion will be required." Respondents' attack on the regulation here is not subject to such a requirement because there is no hearing, and thus no administrative remedy, to exhaust.

[9] See *Ellis* v. *Blum*, 643 F. 2d 68, 74 (CA2 1981) (Friendly, J.). Cf. S. Rep. No. 734, 76th Cong., 1st Sess., 52 (1939); H. R. Rep. No. 728, 76th Cong., 1st Sess., 43–44 (1939).

Whichever may be the better reading of *Salfi* and *Ringer*, we need not pass on the meaning of § 405(h) in the abstract to resolve this case. Section 405(h) does not apply on its own terms to Part B of the Medicare program, but is instead incorporated *mutatis mutandis* by § 1395ii. The legislative history of both the statute establishing the Medicare program and the 1972 amendments thereto provides specific evidence of Congress' intent to foreclose review only of "amount determinations"—*i. e.*, those "quite minor matters," 118 Cong. Rec. 33992 (1972) (remarks of Sen. Bennett), remitted finally and exclusively to adjudication by private insurance carriers in a "fair hearing."[10] By the same token, matters which Congress did *not* delegate to private carriers, such as challenges to the validity of the Secretary's instructions and regulations, are cognizable in courts of law. In the face of this persuasive evidence of legislative intent, we will not indulge the Government's assumption that Congress contemplated review by carriers of "trivial" monetary claims, *ibid.*, but intended no review at all of substantial statutory and constitutional challenges to the Secretary's administration of Part B of the Medicare program.[11] This is an extreme position, and one we would be most reluctant to adopt without "a showing of 'clear and convincing evidence,'" *Abbott Laboratories* v. *Gardner*, 387 U. S., at 141, to overcome the "strong presumption that Congress did not mean to prohibit all judicial review" of executive action, *Dunlop* v. *Bachowski*, 421 U. S., at 567. We ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command. That presumption has not been surmounted here.[12]

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[10] In this connection it bears mention that the legislative history summarized in the preceding section speaks to provisions for appeal generically, and is thus as probative of congressional intent in enacting § 1395ii as it is of § 1395ff. See S. Rep. No. 404, 89th Cong., 1st Sess., 54 (1965) *("Appeals");* H. R. Rep. No. 213, 89th Cong., 1st Sess., 47 (1965) *("Appeals");* H. R. Conf. Rep. No. 92-1605, p. 61 (1972) ("CLARIFICATION OF MEDICARE APPEAL PROCEDURES"); 118 Cong. Rec. 33991 (1972) ("DETERMINATIONS AND APPEALS") (caption to amendment proposed by Sen. Bennett).

[11] We do not believe that our decision will open the floodgates to millions of Part B Medicare claims. Unlike the *determinations* of amounts of benefits, the *method* by which such amounts are determined ordinarily affects vast sums of money and thus differs qualitatively from the "quite minor matters" review of which Congress confined to hearings by carriers. In addition, as one commentator pointed out, "permitting review only [of] . . . a particular statutory or administrative standard . . . would not result in a costly flood of litigation, because the validity of a standard can be readily

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established, at times even in a single case." Note, 97 Harv. L. Rev. 778, 792 (1984) (footnote omitted). We observed no flood of litigation in the first 20 years of operation of Part B of the Medicare program, and we seriously doubt that we will be inundated in the future.

[12] Our disposition avoids the "serious constitutional question" that would arise if we construed § 1395ii to deny a judicial forum for constitutional claims arising under Part B of the Medicare program. *Weinberger* v. *Salfi*, 422 U. S., at 762 (citing *Johnson* v. *Robison*, 415 U. S. 361, 366–367 (1974). See *Yakus* v. *United States*, 321 U. S. 414, 433–444 (1944); *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 84 (1936) (Brandeis, J., concurring); Gunther, Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate, 36 Stan. L. Rev. 895, 921, n. 113 (1984) ("[A]ll agree that Congress cannot bar all remedies for enforcing federal constitutional rights"). Cf. Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1378–1379 (1953). It also accords with our decision in *Schweiker* v. *McClure*, 456 U. S. 188 (1982), in which we resolved a constitutional challenge arising under Part B of the Medicare program. Although the Government notes, quite accurately, that our opinion in *McClure* makes no mention of the jurisdictional question, we can hardly be charged with overlooking that point. *McClure* was argued and announced the same day as *Erika*, a case which did concern the judicial competence to review a challenge arising under Part B; it was written by the same Member of this Court who authored *Erika*, immediately precedes *Erika* in the United States Reports, and contains a number of cross-references to that opinion. Finally, we cannot, as the Government would have us, dismiss respondents' constitutional attack as insubstantial—that is to say, "essentially fictitious," "obviously frivolous," and "obviously without merit"—under *Hagans* v. *Lavine*, 415 U. S. 528, 537 (1974) (internal quotations omitted), as would be necessary to decline jurisdiction over

The judgment of the Court of Appeals is

Affirmed.

JUSTICE REHNQUIST took no part in the consideration or decision of this case.

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the case. Both courts below found the classification embodied in the regulation to be "irrational," see *supra*, at 668–669, and although this finding was made with respect to respondents' statutory claims, it surely casts sufficient doubt on the constitutionality of the classification under the Due Process and Equal Protection Clauses to merit resolution of the constitutional challenge.

CRANE *v.* KENTUCKY

CERTIORARI TO THE SUPREME COURT OF KENTUCKY

No. 85-5238. Argued April 23, 1986—Decided June 9, 1986

Prior to his trial for murder in a Kentucky court, petitioner moved to suppress his confession. Following a hearing, the trial court determined that the confession was voluntary and denied the motion. At trial, petitioner, who was 16 years old at the time of his arrest, sought to introduce testimony describing the length of the interrogation and the manner in which it was conducted. In attempting to introduce such testimony, petitioner hoped to show that the confession, which was the principal component of the State's case, was unworthy of belief. The trial court ruled that the testimony pertained solely to the issue of voluntariness and was therefore inadmissible. The jury returned a verdict of guilty. The Kentucky Supreme Court affirmed, rejecting petitioner's claim that the exclusion of the testimony violated his rights under the Sixth and Fourteenth Amendments.

Held: The exclusion of the testimony about the circumstances of his confession deprived petitioner of his fundamental constitutional right—whether under the Due Process Clause of the Fourteenth Amendment or under the Compulsory Process or Confrontation Clauses of the Sixth Amendment—to a fair opportunity to present a defense. Evidence about the manner in which a confession was secured, in addition to bearing on its voluntariness, often bears on its credibility, a matter that is exclusively for the jury to assess. The physical and psychological environment that yielded a confession is not only relevant to the legal question of voluntariness but can also be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence, especially in a case such as this where there apparently was no physical evidence to link petitioner to the crime. Respondent's argument that any error was harmless since the excluded evidence came in through other witnesses should be directed in the first instance to the state court. Pp. 687-692.

690 S. W. 2d 753, reversed and remanded.

O'CONNOR, J., delivered the opinion for a unanimous Court.

Frank W. Heft, Jr., argued the cause for petitioner. With him on the briefs were *J. David Niehaus* and *Daniel T. Goyette.*

John S. Gillig, Assistant Attorney General of Kentucky, argued the cause for respondent. With him on the brief were *David L. Armstrong*, Attorney General, and *Virgil W. Webb III*, Assistant Attorney General.

JUSTICE O'CONNOR delivered the opinion of the Court.

Prior to his trial for murder, petitioner moved to suppress his confession. The trial judge conducted a hearing, determined that the confession was voluntary, and denied the motion. At trial, petitioner sought to introduce testimony about the physical and psychological environment in which the confession was obtained. His objective in so doing was to suggest that the statement was unworthy of belief. The trial court ruled that the testimony pertained solely to the issue of voluntariness and was therefore inadmissible. The question presented is whether this ruling deprived petitioner of his rights under the Sixth and Fourteenth Amendments to the Federal Constitution.

I

On August 7, 1981, a clerk at the Keg Liquor Store in Louisville, Kentucky, was shot to death, apparently during the course of a robbery. A complete absence of identifying physical evidence hampered the initial investigation of the crime. A week later, however, the police arrested petitioner, then 16 years old, for his suspected participation in an unrelated service station holdup. According to police testimony at the suppression hearing, "just out of the clear blue sky," petitioner began to confess to a host of local crimes, including shooting a police officer, robbing a hardware store, and robbing several individuals at a bowling alley. App. 4. Their curiosity understandably aroused, the police transferred petitioner to a juvenile detention center to continue the interrogation. After initially denying any involvement in the Keg Liquors shooting, petitioner eventually confessed to that crime as well.

Subsequent to his indictment for murder, petitioner moved to suppress the confession on the grounds that it had been impermissibly coerced in violation of the Fifth and Fourteenth

Amendments to the Federal Constitution. At the ensuing hearing, he testified that he had been detained in a windowless room for a protracted period of time, that he had been surrounded by as many as six police officers during the interrogation, that he had repeatedly requested and been denied permission to telephone his mother, and that he had been badgered into making a false confession. Several police officers offered a different version of the relevant events. Concluding that there had been "no sweating or coercion of the defendant" and "no overreaching" by the police, the court denied the motion. *Id.*, at 21.

The case proceeded to trial. In his opening statement, the prosecutor stressed that the Commonwealth's case rested almost entirely on petitioner's confession and on the statement of his uncle, who had told the police that he was also present during the holdup and murder. Tr. 10–14. In response, defense counsel outlined what would prove to be the principal avenue of defense advanced at trial—that, for a number of reasons, the story petitioner had told the police should not be believed. The confession was rife with inconsistencies, counsel argued. For example, petitioner had told the police that the crime was committed during daylight hours and that he had stolen a sum of money from the cash register. In fact, counsel told the jury, the evidence would show that the crime occurred at 10:40 p.m. and that no money at all was missing from the store. Beyond these inconsistencies, counsel suggested, "[t]he very circumstances surrounding the giving of the [confession] are enough to cast doubt on its credibility." *Id.*, at 16. In particular, she continued, evidence bearing on the length of the interrogation and the manner in which it was conducted would show that the statement was unworthy of belief.

In response to defense counsel's opening statement, and before any evidence was presented to the jury, the prosecutor moved *in limine* to prevent the defense from introducing any testimony bearing on the circumstances under which the confession was obtained. Such testimony bore only on the "voluntariness" of the confession, the prosecutor urged, a "legal matter" that had already been resolved by the court in its earlier ruling. App. 27. Defense counsel responded that she had no intention of relitigating the issue of voluntariness, but was seeking only to demonstrate that the circumstances of the confession "cas[t] doubt on its validity and its credibility." *Ibid.* Rejecting this reasoning, the court granted the prosecutor's motion. Although the precise contours of the ruling are somewhat ambiguous, the court expressly held that the defense could inquire into the inconsistencies contained in the confession, but would not be permitted to "develop in front of the jury" any evidence about the duration of the interrogation or the individuals who were in attendance. *Id.*, at 28.

After registering a continuing objection, petitioner invoked a Kentucky procedure under which he was permitted to develop a record of the evidence he would have put before the jury were it not for the court's evidentiary ruling. That evidence included testimony from two police officers about the size and other physical characteristics of the interrogation room, the length of the interview, and various other details about the taking of the confession. *Id.*, at 45–53.

The jury returned a verdict of guilty, and petitioner was sentenced to 40 years in prison. The sole issue in the ensuing appeal to the Kentucky Supreme Court was whether the exclusion of testimony about the circumstances of the confession violated petitioner's rights under the Sixth and Fourteenth Amendments to the Federal Constitution. Over one dissent, the court rejected the claim and affirmed the conviction and sentence. 690 S. W. 2d 753 (1985). The excluded testimony "related solely to voluntariness," the court reasoned. *Id.*, at 754. Although evidence bearing on the credibility of the confession would have been admissible, under established Kentucky procedure a trial court's pretrial voluntariness determination is conclusive and may not be relitigated at trial. Because the proposed testimony about the circumstances of petitioner's confession pertained only to the voluntariness question, the court held, there was no error in keeping that testimony from the jury.

Because the reasoning of the Kentucky Supreme Court is directly at odds with language in several of this Court's opinions, see, *e. g., Lego* v. *Twomey,* 404 U. S. 477, 485–486 (1972), and because it conflicts with the decisions of every other state court to have confronted the issue, see, *e. g., Beaver* v. *State,* 455 So. 2d 253, 256 (Ala. Crim. App. 1984); *Palmes* v. *State,* 397 So. 2d 648, 653 (Fla. 1981), we granted the petition for certiorari. 474 U. S. 1019 (1985). We now reverse and remand.

II

The holding below rests on the apparent assumption that evidence bearing on the voluntariness of a confession and evidence bearing on its credibility fall in conceptually distinct and mutually exclusive categories. Once a confession has been found voluntary, the Supreme Court of Kentucky believed, the evidence that supported that finding may not be presented to the jury for any other purpose. This analysis finds no support in our cases, is premised on a misconception about the role of confessions in a criminal trial, and, under the circumstances of this case, contributed to an evidentiary ruling that deprived petitioner of his fundamental constitutional right to a fair opportunity to present a defense. *California* v. *Trombetta,* 467 U. S. 479, 485 (1984).

It is by now well established that "certain interrogation techniques, either in isolation, or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment." *Miller* v. *Fenton,* 474 U. S. 104, 109 (1985). To assure that the fruits of such techniques are never used to secure a conviction, due process also requires "that a jury [not] hear a confession unless and until the trial judge [or some other independent decisionmaker] has determined that it was freely and voluntarily given." *Sims* v. *Georgia,* 385 U. S. 538, 543–544 (1967). See generally *Jackson* v. *Denno,* 378 U. S. 368 (1964).

In laying down these rules the Court has never questioned that "evidence surrounding the making of a confession bears on its credibility" as well as its voluntariness. *Id.,* at 386, n. 13. As the Court noted in *Jackson,* because "questions of credibility, whether of a witness or of a confession, are for the jury," the requirement that the court make a pretrial *voluntariness* determination does not undercut the defendant's traditional prerogative to challenge the confession's *reliability* during the course of the trial. *Ibid.* To the same effect was *Lego* v. *Twomey, supra,* where the Court stated,

> "Nothing in *Jackson* [v. *Denno*] questioned the province or capacity of juries to assess the truthfulness of confessions. Nothing in that opinion took from the jury any evidence relating to the accuracy or weight of confessions admitted into evidence. A defendant has been as free since *Jackson* as he was before to familiarize a jury with circumstances that attend the taking of his confession, including facts bearing upon its weight and voluntariness." *Id.,* at 485–486.

Thus, as *Lego* and *Jackson* make clear, to the extent the Court has addressed the question at all, it has expressly assumed that evidence about the manner in which a confession was secured will often be germane to its probative weight, a matter that is exclusively for the jury to assess.

The decisions in both *Jackson* and *Lego,* while not framed in the language of constitutional command, reflect the common-sense understanding that the circumstances surrounding the taking of a confession can be highly relevant to two separate inquiries, one legal and one factual. The manner in which a statement was extracted is, of course, relevant to the purely legal question of its voluntariness, a question most, but not all, States assign to the trial judge alone to resolve. See *Jackson* v. *Denno, supra,* at 378. But the physical and psychological environment that yielded the confession can also be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence. Confessions, even those that have been found to be voluntary, are not conclusive of guilt. And, as with any other part of the prosecutor's case, a confession may be shown to be "insufficiently corroborated or otherwise . . . unworthy of belief." *Lego* v. *Twomey, supra,* at 485–486. Indeed, stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt? Accordingly, regardless of whether the defendant marshaled the same evidence earlier in support of an unsuccessful motion to suppress, and entirely independent of any question of voluntariness, a defendant's case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility.

This simple insight is reflected in a federal statute, 18 U. S. C. § 3501(a), the Federal Rules of Evidence, Fed. Rule Evid. 104(e), and the statutory and decisional law of virtually every State in the Nation. See, *e. g.,* Mont. Code Ann. § 46–13–301(5) (1983); *Palmes* v. *State, supra,* at 653. We recognize, of course, that under our federal system even a consensus as broad as this one is not inevitably congruent with the dictates of the Constitution. We acknowledge also our traditional reluctance to impose constitutional constraints on ordinary evidentiary rulings by state trial courts. In any given criminal case the trial judge is called upon to make dozens, sometimes hundreds, of decisions concerning the admissibility of evidence. As we reaffirmed earlier this Term, the Constitution leaves to the judges who must make these decisions "wide latitude" to exclude evidence that is "repetitive . . . , only marginally relevant" or poses an undue risk of "harassment, prejudice, [or] confusion of the issues." *Delaware* v. *Van Arsdall*, 475 U. S. 673, 679 (1986). Moreover, we have never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability—even if the defendant would prefer to see that evidence admitted. *Chambers* v. *Mississippi*, 410 U. S. 284, 302 (1973). Nonetheless, without "signal[ing] any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures," we have little trouble concluding on the facts of this case that the blanket exclusion of the proffered testimony about the circumstances of petitioner's confession deprived him of a fair trial. *Id.*, at 302–303.

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers* v. *Mississippi*, *supra*, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, *Washington* v. *Texas*, 388 U. S. 14, 23 (1967); *Davis* v. *Alaska*, 415 U. S. 308 (1974), the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *California* v. *Trombetta*, 467 U. S., at 485; cf. *Strickland* v. *Washington*, 466 U. S. 668, 684–685 (1984) ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment"). We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. *In re Oliver*, 333 U. S. 257, 273 (1948); *Grannis* v. *Ordean*, 234 U. S. 385, 394 (1914). That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and "survive the crucible of meaningful adversarial testing." *United States* v. *Cronic*, 466 U. S. 648, 656 (1984). See also *Washington* v. *Texas*, *supra*, at 22–23.

Under these principles, the Kentucky courts erred in foreclosing petitioner's efforts to introduce testimony about the environment in which the police secured his confession. As both *Lego* and *Jackson* make clear, evidence about the manner in which a confession was obtained is often highly relevant to its reliability and credibility. Such evidence was especially relevant in the rather peculiar circumstances of this case. Petitioner's entire defense was that there was no physical evidence to link him to the crime and that, for a variety of reasons, his earlier admission of guilt was not to be believed. To support that defense, he sought to paint a picture of a young, uneducated boy who was kept against his will in a small, windowless room for a protracted period of time until he confessed to every unsolved crime in the county, including the one for which he now stands convicted. We do not, of course, pass on the strength or merits of that defense. We do, however, think it plain that introducing evidence of the physical circumstances that yielded the confession was all but indispensable to any chance of its succeeding. Especially since neither the Supreme Court of Kentucky in its opinion, nor respondent in its argument to this Court, has advanced any rational justification for the wholesale exclusion of this body of potentially exculpatory evidence, the decision below must be reversed.

Respondent contends that any error was harmless since the very evidence excluded by the trial court's ruling ultimately came in through other witnesses. Petitioner concedes, and we agree, that the erroneous ruling of the trial court is subject to harmless error analysis. Tr. of Oral Arg. 7; cf. *Delaware* v. *Van Arsdall*, *supra*. We believe, however, that respondent's harmless error argument should be directed in the first instance to the state court.

Accordingly, the judgment of the Supreme Court of Kentucky is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

So ordered.

BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* ROY ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 84–780. Argued January 14, 1986—Decided June 11, 1986

Appellees applied for and received benefits under the Aid to Families with Dependent Children (AFDC) program and the Food Stamp program. They refused, however, to comply with the federal statutory requirements that participants in those programs furnish the state welfare agencies who administer the programs with their Social Security numbers and those of each member of their household as a condition of receiving benefits, and that each state agency utilize those numbers in administering the programs. Appellees contended that obtaining a Social Security number for their 2-year-old daughter would violate their Native American religious beliefs. Thereafter, the Pennsylvania Department of Public Welfare terminated AFDC benefits payable to appellees on the child's behalf and instituted proceedings to reduce the level of food stamps that appellees' household was receiving. Appellees then filed an action in Federal District Court, claiming that the Free Exercise Clause of the First Amendment entitled them to an exemption from the Social Security number requirements, and requesting injunctive and other relief. Following a trial in which it was disclosed that the child had in fact been assigned a Social Security number, the court held that the public interest in maintaining an efficient and fraud-resistant system could be met without requiring a Social Security number for the child. The court then enjoined the Secretary of Health and Human Services from using and disseminating the Social Security number issued in the child's name and also enjoined the federal and state defendants from denying appellees benefits, until the child's 16th birthday, because of their refusal to provide a Social Security number for her.

Held: The judgment is vacated, and the case is remanded.

590 F. Supp. 600, vacated and remanded.

CHIEF JUSTICE BURGER delivered the opinion of the Court with respect to Parts I and II, concluding that the statutory requirement that a state agency utilize Social Security numbers in administering the programs in question does not violate the Free Exercise Clause. That Clause affords an individual protection from certain forms of governmental compulsion but does not afford an individual a right to dictate the conduct of the Government's internal procedures. The Government's use of a Social Security number for appellees' child does not itself impair appellees' freedom to exercise their religion. Pp. 699–701.

CHIEF JUSTICE BURGER, joined by JUSTICE POWELL and JUSTICE REHNQUIST, concluded in Part III that the statutory requirement that applicants provide a Social Security number as a condition of eligibility for the benefits in question does not violate the Free Exercise Clause. That requirement is facially neutral in religious terms, applies to all applicants for the benefits involved, and clearly promotes a legitimate and important public interest. Preventing fraud in these benefit programs is an important goal, and the Social Security number requirement is a reasonable means of promoting that goal. Government regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity or compels conduct that some find objectionable for religious reasons. Pp. 701–712.

BURGER, C. J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, in which BRENNAN, MARSHALL, BLACKMUN, POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined, and an opinion with respect to Part III, in which POWELL and REHNQUIST, JJ., joined. BLACKMUN, J., filed an opinion concurring in part, *post*, p. 712. STEVENS, J., filed an opinion concurring in part and concurring in the result, *post*, p. 716. O'CONNOR, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 724. WHITE, J., filed a dissenting opinion, *post*, p. 733.

Deputy Solicitor General Geller argued the cause for appellants. With him on the briefs were *Solicitor General Fried, Acting Assistant Attorney General Willard, Kathryn A. Oberly,* and *Peter R. Maier.*

Gary S. Gildin argued the cause for appellees. With him on the brief were *Franklin A. Miles, Jr., Stefan Presser,* and *Charles S. Sims.**

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*Briefs of *amici curiae* urging affirmance were filed for the Catholic League for Religious and Civil Rights by *Steven Frederick McDowell;* for the National Congress of American Indians et al. by *Steven C. Moore;* and for the Rutherford Institute et al. by *W. Charles Bundren, Guy O. Farley, Jr., John W. Whitehead, James J. Knicely, Thomas O. Kotouc, Wendell R. Bird,* and *William B. Hollberg.*

CHIEF JUSTICE BURGER announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, and an opinion with respect to Part III, in which JUSTICE POWELL and JUSTICE REHNQUIST join.

The question presented is whether the Free Exercise Clause of the First Amendment compels the Government to accommodate a religiously based objection to the statutory requirements that a Social Security number be provided by an applicant seeking to receive certain welfare benefits and that the States use these numbers in administering the benefit programs.

I

Appellees Stephen J. Roy and Karen Miller applied for and received benefits under the Aid to Families with Dependent Children program and the Food Stamp program. They refused to comply, however, with the requirement, contained in 42 U. S. C. § 602(a)(25)[1] and 7 U. S. C. § 2025(e), that participants in these programs furnish their state welfare agencies with the Social Security numbers of the members of their household as a condition of receiving benefits. Appellees contended that obtaining a Social Security number for their 2-year-old daughter, Little Bird of the Snow, would violate their Native American religious beliefs. The Pennsylvania Department of Public Welfare thereafter terminated AFDC and medical benefits payable to appellees on the child's behalf and instituted proceedings to reduce the level of food stamps that appellees' household was receiving. Appellees then filed this action against the Secretary of the Pennsylvania Department of Public Welfare, the Secretary of Health and Human Services, and the Secretary of Agriculture, arguing that the Free Exercise Clause entitled them to an exemption from the Social Security number requirement. In their complaint, appellees stated that "[t]he sole basis" for the denial of welfare benefits was "Mr. Roy's refusal to obtain a Social Security Number for Little Bird of the Snow," and thus requested injunctive relief, damages, and benefits. In the statement of "undisputed facts," the parties agreed that Little Bird of the Snow did not have a Social Security number.

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[1] We refer to the statutory scheme as it existed at the time appellees filed suit. The scheme has since been amended, although the Social Security number requirement has been retained in virtually identical form. See Deficit Reduction Act of 1984, Pub. L. 98–369, § 2651(a), 98 Stat. 1147.

At trial, Roy testified that he had recently developed a religious objection to obtaining a Social Security number for Little Bird of the Snow.[2] Roy is a Native American descended from the Abenaki Tribe, and he asserts a religious belief that control over one's life is essential to spiritual purity and indispensable to "becoming a holy person." Based on recent conversations with an Abenaki chief, Roy believes that technology is "robbing the spirit of man." In order to prepare his daughter for greater spiritual power, therefore, Roy testified to his belief that he must keep her person and spirit unique and that the uniqueness of the Social Security number as an identifier, coupled with the other uses of the number over which she has no control, will serve to "rob the spirit" of his daughter and prevent her from attaining greater spiritual power.

For purposes of determining the breadth of Roy's religious concerns, the trial judge raised the possibility of using the phonetics of his daughter's name to derive a Social Security number. Although Roy saw "a lot of good" in this suggestion, he stated it would violate his religious beliefs because the special number still would apply uniquely and identify her. Roy also testified that his religious objection would not be satisfied even if the Social Security Administration appended the daughter's full tribal name to her Social Security number.

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[2] Roy and Miller both have Social Security numbers. They also obtained a Social Security number for their 5-year-old daughter Renee at some time prior to the present dispute.

In Roy's own testimony, he emphasized the evil that would flow simply from *obtaining* a number.[3] On the last day of trial, however, a federal officer inquired whether Little Bird of the Snow already had a Social Security number; he learned that a number had been assigned—under first name "Little," middle name "Bird of the Snow," and last name "Roy."

The Government at this point suggested that the case had become moot because, under Roy's beliefs, Little Bird of the Snow's spirit had already been "robbed." Roy, however, was recalled to the stand and testified that her spirit would be robbed only by "use" of the number. Since no known use of the number had yet been made, Roy expressed his belief that her spirit had not been damaged. The District Court concluded that the case was not moot because of Roy's beliefs regarding "use" of the number. See *Roy* v. *Cohen*, 590 F. Supp. 600, 605 (MD Pa. 1984) (finding of fact 33) ("Roy believes that the establishment of a social security number for Little Bird of the Snow, without more, has not 'robbed her spirit,' but widespread use of the social security number by the federal or state governments in their computer systems would have that effect").

After hearing all of the testimony, the District Court denied appellees' request for damages and benefits, but granted injunctive relief. Based on the testimony of the Government's experts and the obvious fact that many people share certain names, the District Court found that "[u]tilization in the computer system of the name of a benefit recipient alone frequently is not sufficient to ensure the proper payment of benefits." The court nevertheless concluded that the public "interest in maintaining an efficient and fraud resistant system can be met without requiring use of a social security number for Little Bird of the Snow," elaborating:

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[3] "[Q.] Mr. Roy, could you explain why obtaining a Social Security Number for Little Bird of the Snow would be contrary to your religious beliefs as a native Abenaki?

"A. Yes. Because we felt that this number would be used to rob her of her ability to have greater power in that this number is a unique number. It serves unique purposes. It's applied to her and only her; and being applied to her, that's what offends us, and we try to keep her person unique, and we try to keep her spirit unique, and we're scared that if we were to use this number, she would lose control of that and she would have no ability to protect herself from any evil that that number might be used against her." App. 85.

> "It appears to the Court that the harm that the Government might suffer if [appellees] prevailed in this case would be, at worst, that one or perhaps a few individuals could fraudulently obtain welfare benefits. Such a result would obtain only if (1) Little Bird of the Snow attempted fraudulently to obtain welfare benefits or someone else attempted fraudulently to obtain such benefits using Little Bird of the Snow's name *and* (2) identification procedures available to the Defendants that do not require utilization of a social security number failed to expose the fraud. This possibility appears to the Court to be remote." *Id.*, at 612–613.

Citing our decision in *United States* v. *Lee*, 455 U. S. 252 (1982), the court entered an injunction containing two basic components. *First*, the Secretary of Health and Human Services was "permanently restrained from making any use of the social security number which was issued in the name of Little Bird of the Snow Roy and from disseminating the number to any agency, individual, business entity, or any other third party." *Second*, the federal and state defendants were enjoined until Little Bird of the Snow's 16th birthday from denying Roy cash assistance, medical assistance, and food stamps "because of the [appellees'] refusal to provide a social security number for her."

We noted probable jurisdiction, 472 U. S. 1016 (1985), and we vacate and remand.

II

Appellees raise a constitutional challenge to two features of the statutory scheme here.[4] They object to Congress' requirement that a state AFDC plan "*must* . . . provide (A) that, *as a condition of eligibility* under the plan, *each* applicant for or recipient of aid *shall* furnish to the State agency his social security account number." 42 U. S. C. § 602(a)(25) (emphasis added). They also object to Congress' requirement that "such State agency *shall utilize* such account numbers . . . in the administration of such plan." *Ibid.* (emphasis added).[5] We analyze each of these contentions, turning to the latter contention first.

Our cases have long recognized a distinction between the freedom of individual belief, which is absolute, and the freedom of individual conduct, which is not absolute. This case implicates only the latter concern. Roy objects to the statutory requirement that state agencies "shall utilize" Social Security numbers not because it places any restriction on what he may believe or what he may do, but because he believes the use of the number may harm his daughter's spirit.

Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family. The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. Just as the Government may not insist that appellees engage in any set form of religious observance, so appellees may not demand that the Government join in their chosen religious practices by refraining from using a number to identify their daughter. "[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government." *Sherbert* v. *Verner*, 374 U. S. 398, 412 (1963) (Douglas, J., concurring).

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[4] They also raise a statutory argument—that the Government's denial of benefits to them constitutes illegal discrimination on the basis of religion or national origin. See 42 U. S. C. § 2000d; 7 U. S. C. § 2011. We find these claims to be without merit.

[5] The Food Stamp program restrictions that appellees challenge contain restrictions virtually identical to those in the AFDC program quoted in the text. See 7 U. S. C. § 2025(e).

As a result, Roy may no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets. The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures.

As Roy points out, eight years ago Congress passed a Joint Resolution concerning American Indian religious freedom that provides guidance with respect to this case. As currently codified, the Resolution provides:

> "On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites." 42 U. S. C. § 1996.

That Resolution—with its emphasis on protecting the freedom to believe, express, and exercise a religion—accurately identifies the mission of the Free Exercise Clause itself. The Federal Government's use of a Social Security number for Little Bird of the Snow does not itself in any degree impair Roy's "freedom to believe, express, and exercise" his religion.[6] Consequently, appellees' objection to the statutory requirement that each state agency "shall utilize" a Social Security number in the administration of its plan is without merit. It follows that their request for an injunction against use of the Social Security number in processing benefit applications should have been rejected. We therefore hold that the portion of the District Court's injunction that permanently restrained the Secretary from making any use of the Social Security number that had been issued in the name of Little Bird of the Snow Roy must be vacated.

III

Roy also challenges Congress' requirement that a state AFDC plan "*must* . . . provide (A) that, *as a condition of eligibility* under the plan, *each* applicant for or recipient of aid *shall furnish* to the State agency his social security account number." 42 U. S. C. § 602(a)(25) (emphasis added).[7] The

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[6] Roy's religious views may not accept this distinction between individual and governmental conduct. See, *e. g.*, n. 3, *supra*. It is clear, however, that the Free Exercise Clause, and the Constitution generally, recognize such a distinction; for the adjudication of a constitutional claim, the Constitution, rather than an individual's religion, must supply the frame of reference.

[7] This issue is clearly not moot in light of our discussion in Part II, contrary to the suggestion of the two concurrences. JUSTICE STEVENS asserts that "there is nothing in the record to suggest that the Government will not pay the benefits in dispute as soon as the District Court's injunction against the use of the number has been vacated." *Post*, at 723. To my mind, this statement, while true, fundamentally misperceives the nature of appellees' suit. Appellees do not seek to have the Government "pay the benefits in dispute as soon as the District Court's injunction against use of the number has been vacated." Such payment would entail use of Little Bird of the Snow's Social Security number, use that appellees filed suit to prevent.

JUSTICE BLACKMUN similarly believes that on remand "it is possible that the Government, in a welcome display of reasonableness, will decide that since it already has a Social Security number for Little Bird of the Snow, it will not insist that appellees resupply it." *Post*, at 714–715. My reading of the record is that such an occurrence is not a mere "possibility." JUS-

First Amendment's guarantee that "Congress shall make no law . . . prohibiting the free exercise" of religion holds an important place in our scheme of ordered liberty, but the Court has steadfastly maintained that claims of religious conviction do not automatically entitle a person to fix unilaterally the conditions and terms of dealings with the Government. Not all burdens on religion are unconstitutional. See *Reynolds* v. *United States*, 98 U. S. 145 (1879). This was treated recently in *United States* v. *Lee:*

> "To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good. Religious beliefs can be accommodated, but there is a point at which accommodation would 'radically restrict the operating latitude of the legislature.'" 455 U. S., at 259.

TICE STEVENS cites federal regulations that provide that the Government will assist households that, for some reason or other, are unable to furnish a Social Security number. See *post*, at 721–722. Moreover, the Government's brief in this Court reports that "we are advised by the Social Security Administration that *the agency itself assigns [Social Security numbers] to persons who are required by federal law to have one but decline to complete an application.* If, for religious reasons, the individual requiring [a Social Security number] does not wish to receive a social security card, the agency will accommodate that request. Similarly, when an applicant refuses to sign an application for [a Social Security number] on religious grounds, [Social Security Administration personnel] may sign in lieu of the applicant." Brief for Appellants 46, n. 19 (emphasis added; citations omitted). Thus, the Government undoubtedly would be happy to "supply" the number for appellees—*i. e.*, fill the number in on their applications—if this is what they wanted. But appellees do not desire any such assistance from the Government; instead they filed suit seeking a ruling excluding them from the operation of any portion of the statutory scheme involving Social Security numbers. They continue to press this claim in this Court. For the reasons advanced here this claim ultimately lacks merit, but it certainly is not moot.

Also, in view of our analysis of the case, because all relevant facts are before the Court and further proceedings in the District Court could not produce information that would change the result, the case is ripe for decision.

The statutory requirement that applicants provide a Social Security number is wholly neutral in religious terms and uniformly applicable. There is no claim that there is any attempt by Congress to discriminate invidiously or any covert suppression of particular religious beliefs. The administrative requirement does not create any danger of censorship[8] or place a direct condition or burden on the dissemination of religious views.[9] It does not intrude on the organization of a religious institution[10] or school.[11] It may indeed confront some applicants for benefits with choices, but in no sense does it affirmatively compel appellees, by threat of sanctions, to refrain from religiously motivated conduct[12] or to engage in conduct that they find objectionable for religious reasons.[13] Rather, it is appellees who seek benefits from the Government and who assert that, because of certain religious beliefs, they should be excused from compliance with a condition that is binding on all other persons who seek the same benefits from the Government.

This is far removed from the historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause of the First Amendment. See generally M. Malbin, Religion and Politics: The Intentions of the Authors of the First Amendment (1978). We are not unmindful of the importance of many government benefits today or of the value of sincerely held religious beliefs. However, while we do not believe that no government compulsion is involved, we cannot ignore the reality that denial of such benefits by a uniformly applicable statute neutral on its face is of a wholly different, less intrusive nature than affirmative compulsion or prohibition, by threat of penal sanctions, for conduct that has religious implications.

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[8] Cf. *Cantwell* v. *Connecticut*, 310 U. S. 296, 305 (1940).

[9] Cf. *Follett* v. *Town of McCormick*, 321 U. S. 573, 577–578 (1944); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 112 (1943).

[10] Cf. *Kedroff* v. *St. Nicholas Cathedral*, 344 U. S. 94 (1952).

[11] Cf. *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490 (1979).

[12] Cf. *Prince* v. *Massachusetts*, 321 U. S. 158 (1944); *Cox* v. *New Hampshire*, 312 U. S. 569, 574 (1941); *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *Reynolds* v. *United States*, 98 U. S. 145, 167 (1879).

[13] *United States* v. *Lee*, 455 U. S. 252, 259 (1982); *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972); *Gillette* v. *United States* 401 U. S. 437 (1971); *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943); *Jacobson* v. *Massachusetts*, 197 U. S. 11 (1905).

This distinction is clearly revealed in the Court's opinions. Decisions rejecting religiously based challenges have often recited the fact that a mere denial of a governmental benefit by a uniformly applicable statute does not constitute infringement of religious liberty. In *Hamilton* v. *Regents of University of California*, 293 U. S. 245 (1934), for example, the Court rejected a religious challenge by students to military courses required as part of their curriculum, explaining:

> "The fact that they are able to pay their way in this university but not in any other institution in California is without significance upon any constitutional or other question here involved. California has not drafted or called them to attend the university. They are seeking education offered by the State and at the same time insisting that they be excluded from the prescribed course solely upon grounds of their religious beliefs and conscientious objections to war . . . ." *Id.*, at 262.[14]

In cases upholding First Amendment challenges, on the other hand, the Court has often relied on the showing that compulsion of certain activity with religious significance was involved. In *West Virginia Bd. of Ed.* v. *Barnette,* 319 U. S. 624 (1943), for example, the Court distinguished the earlier *Hamilton* holding and upheld a challenge to a flag salute requirement:

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[14] Concurring in *McGowan* v. *Maryland*, 366 U. S. 420, 521 (1961), Justice Frankfurter viewed it as important that the challenged statutes "do not make criminal, do not place under the onus of civil or criminal disability, any act which is itself prescribed by the duties of the Jewish or other religions." In *Braunfeld* v. *Brown*, 366 U. S. 599, 605–606 (1961), the plurality opinion emphasized: "Fully recognizing that the alternatives open to appellants and others similarly situated . . . may result in some financial sacrifice in order to observe their religious beliefs, still the option is wholly different than when the legislation attempts to make a religious practice itself unlawful."

> "Here . . . we are dealing with a compulsion of students to declare a belief. . . . This issue is not prejudiced by the Court's previous holding that where a State, without compelling attendance, extends college facilities to pupils who voluntarily enroll, it may prescribe military training as part of the course without offense to the Constitution. It was held that those who take advantage of its opportunities may not on ground of conscience refuse compliance with such conditions. *Hamilton* v. *Regents,* 293 U. S. 245. In the present case attendance is not optional." 319 U. S., at 631–632.[15]

The distinction between governmental compulsion and conditions relating to governmental benefits contained in these two cases was emphasized by JUSTICE BRENNAN in his concurring opinion in *Abington School District* v. *Schempp,* 374 U. S. 203 (1963):

> "The different results of *[Hamilton* and *Barnette]* are attributable only in part to a difference in the strength of the particular state interests which the respective statutes were designed to serve. Far more significant is the fact that *Hamilton* dealt with the voluntary attendance at college of young adults, while *Barnette* involved the compelled attendance of young children at elementary and secondary schools. This distinction warrants a difference in constitutional results." *Id.,* at 252–253 (footnote omitted).

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[15] In *Wisconsin* v. *Yoder, supra,* at 218, we similarly relied on the fact that "[t]he impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs."

We have repeatedly emphasized this distinction: In rejecting a Free Exercise challenge in *Bob Jones University* v. *United States*, 461 U. S. 574, 603–604 (1983), for example, we observed that the "[d]enial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets."[16]

We conclude then that government regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons. Although the denial of government benefits over religious objection can raise serious Free Exercise problems, these two very different forms of government action are not governed by the same constitutional standard. A governmental burden on religious liberty is not insulated from review simply because it is indirect, *Thomas* v. *Review Board of Indiana Employment Security Div.*, 450 U. S. 707, 717–718 (1981) (citing *Sherbert* v. *Verner*, 374 U. S., at 404);

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[16] JUSTICE O'CONNOR's partial dissent asserts that the Court's holding "has no basis in precedent," *post*, at 727. To the contrary, it is the history advanced by the dissenting opinions that is revisionist. The dissent characterizes our prior cases as holding that the denial of a benefit is the same, for constitutional purposes, as the imposition of a criminal sanction. In *Bob Jones University*, however, the Court upheld the denial of tax benefits to a school that prohibited interracial dating, observing that the school remained wholly free to "observ[e] [its] religious tenets." 461 U. S., at 604. If denying governmental benefits is the same as imposing criminal sanctions, then the Free Exercise Clause could not prevent the Government from ordering Bob Jones University, under pain of criminal penalty, to violate its religious beliefs and permit interracial dating on its campus. But that difficult question is still an open one since "the Constitution may compel toleration of private discrimination in some circumstances." *Norwood* v. *Harrison*, 413 U. S. 455, 463 (1973).

but the nature of the burden is relevant to the standard the government must meet to justify the burden.

The general governmental interests involved here buttress this conclusion. Governments today grant a broad range of benefits; inescapably at the same time the administration of complex programs requires certain conditions and restrictions. Although in some situations a mechanism for individual consideration will be created, a policy decision by a government that it wishes to treat all applicants alike and that it does not wish to become involved in case-by-case inquiries into the genuineness of each religious objection to such condition or restrictions is entitled to substantial deference. Moreover, legitimate interests are implicated in the need to avoid any appearance of favoring religious over nonreligious applicants.

The test applied in cases like *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972), is not appropriate in this setting. In the enforcement of a facially neutral and uniformly applicable requirement for the administration of welfare programs reaching many millions of people, the Government is entitled to wide latitude. The Government should not be put to the strict test applied by the District Court; that standard required the Government to justify enforcement of the use of Social Security number requirement as the least restrictive means of accomplishing a compelling state interest.[17] Absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest.

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[17] It is readily apparent that virtually *every* action that the Government takes, no matter how innocuous it might appear, is potentially susceptible to a Free Exercise objection. For example, someone might raise a religious objection, based on Norse mythology, to filing a tax return on a Wednesday (Woden's day). Accordingly, if the dissent's interpretation of the Free Exercise Clause is to be taken seriously, then the Government will be unable to enforce any generally applicable rule unless it can satisfy a federal court that it has a "compelling government interest." While libertarians and anarchists will no doubt applaud this result, it is hard to imagine that this is what the Framers intended.

We reject appellees' contention that *Sherbert* and *Thomas* compel affirmance. The statutory conditions at issue in those cases provided that a person was not eligible for unemployment compensation benefits if, "without good cause," he had quit work or refused available work. The "good cause" standard created a mechanism for individualized exemptions. If a state creates such a mechanism, its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent. Thus, as was urged in *Thomas*, to consider a religiously motivated resignation to be "without good cause" tends to exhibit hostility, not neutrality, towards religion. See Brief for Petitioner 15, and Brief for American Jewish Congress as *Amicus Curiae* 11, in *Thomas* v. *Review Board of Indiana Employment Security Div.*, O. T. 1979, No. 79–952. See also *Sherbert*, *supra*, at 401–402, n. 4; *United States* v. *Lee*, 455 U. S., at 264, n. 3 (STEVENS, J., concurring in judgment) (*Thomas* and *Sherbert* may be viewed "as a protection against unequal treatment rather than a grant of favored treatment for the members of the religious sect"). In those cases, therefore, it was appropriate to require the State to demonstrate a compelling reason for denying the requested exemption.

Here there is nothing whatever suggesting antagonism by Congress towards religion generally or towards any particular religious beliefs. The requirement that applicants provide a Social Security number is facially neutral and applies to all applicants for the benefits involved. Congress has made no provision for individual exemptions to the requirement in the two statutes in question. Indeed, to the contrary, Congress has specified that a state AFDC plan "*must* . . . provide (A) that, *as a condition of eligibility* under the plan, *each* applicant for or recipient of aid *shall* furnish to the

State agency his social security account number," 42 U. S. C. § 602(a)(25) (emphasis added), and that "[s]tate agencies *shall* (1) *require, as a condition of eligibility* for participation in the food stamp program, that *each* household member furnish to the State agency their social security account number," 7 U. S. C. § 2025(e) (emphasis added). Nor are these requirements relics from the past; Congress made the requirement mandatory for the Food Stamp program in 1981. Compare 7 U. S. C. § 2025(f) (1976 ed., Supp. IV) (State agencies "may" require that each household member furnish their Social Security number), with 7 U. S. C. § 2025(e) (States "shall" require that such numbers be furnished). Congress also recently extended to several other aid programs the mandatory requirement that the States use Social Security numbers in verifying eligibility for benefits. See Deficit Reduction Act of 1984, Pub. L. 98–369, § 2651(a), 98 Stat. 1147.

The Social Security number requirement clearly promotes a legitimate and important public interest. No one can doubt that preventing fraud in these benefits programs is an important goal. As Representative Richmond explained in support of the bill that made the Social Security number requirement mandatory for the Food Stamp program:

> "We know that however generously motivated Americans may be to furnish resources to the poor to enable them to survive, . . . they understandably object if they believe that those resources are being abused or wasted. . . .
>
> "We want to be certain that the food stamp program is run as efficiently and as error-free as possible.
>
> "We want applicants and recipients alike constantly to be aware that the Congress does not and will not tolerate any refusal to disclose earnings accurately, and underreporting of welfare or other assistance program benefits, any efforts to evade the work requirement or any other attempts to take advantage of the program and dollars intended only for those who completely satisfy the strin-

> gent eligibility requirements set forth in sections 5 and 7 of the Food Stamp Act of 1977 and further tightened this year and in this bill." 127 Cong. Rec. 24783 (1981).

We also think it plain that the Social Security number requirement is a reasonable means of promoting that goal. The programs at issue are of truly staggering magnitude. Each year roughly 3.8 million families receive $7.8 billion through federally funded AFDC programs and 20 million persons receive $11 billion in food stamps. The Social Security program itself is the largest domestic governmental program in the United States today, distributing approximately $51 billion monthly to 36 million recipients. Because of the tremendous administrative problems associated with managing programs of this size, the District Court found:

> "Social security numbers are used in making the determination that benefits in the programs are properly paid and that there is no duplication of benefits or failure of payment. . . . Utilization in the computer system of the name of a benefit recipient alone frequently is not sufficient to ensure the proper payment of benefits."

Social Security numbers are unique numerical identifiers and are used pervasively in these programs. The numbers are used, for example, to keep track of persons no longer entitled to receive food stamps because of past fraud or abuses of the program. Moreover, the existence of this unique numerical identifier creates opportunities for ferreting out fraudulent applications through computer "matching" techniques. One investigation, "Project Match," compared federal employee files against AFDC and Medicaid files to determine instances of Government employees receiving welfare benefits improperly. Data from 26 States were examined, and 9,000 individuals were identified as receiving duplicate welfare payments. While undoubtedly some fraud escapes detection in spite of such investigations, the President's Private Sector Survey on Cost Control, known more popularly as the "Grace Commission," recently reported that matching "is the Federal Government's most cost-effective tool for verification or investigation in the prevention and detection of fraud, waste and abuse." 7 The President's Private Sector Survey on Cost Control, Management Office Selected Issues—Information Gap in the Federal Government 90 (1984).

The importance of the Social Security number to these matching techniques is illustrated by the facts of this case. The District Court found that "efficient operation of these [matching] programs requires the use of computer systems that utilize unique numerical identifiers such as the social security number." 590 F. Supp., at 606. It further found that exempting even appellees alone from this requirement could result in "one or perhaps a few individuals . . . fraudulently obtain[ing] welfare benefits," *id.*, at 612, a prospect the court termed "remote." *Id.*, at 613. The District Court's assessment of this probability seems quite dubious.[18] But in any event, we know of no case obligating the Government to tolerate a slight risk of "one or perhaps a few individuals" fraudulently obtaining benefits in order to satisfy a religious objection to a requirement designed to combat that very risk. Appellees may not use the Free Exercise Clause to demand

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[18] The District Court's assessment appears to have turned in part on its belief that it was unlikely that Little Bird of the Snow or her parents would attempt fraudulently to obtain welfare benefits. Without in any way questioning the conclusion that appellees are law-abiding citizens, we believe that the District Court misperceived the nature of the Government's interest. The Government's interest is ensuring a fraud-resistent system in the event that a fraudulent application *is made* by appellees.

This misunderstanding of the Government's interest probably accounts for the District Court's conclusion that the Government's interest in preventing fraud "can be satisfied without requiring a social security number for Little Bird of the Snow." 590 F. Supp., at 607. In any event, this conclusionary statement is certainly at odds with the District Court's more specific statement quoted in text regarding the prospects for "one or perhaps a few individuals . . . fraudulently obtain[ing] welfare benefits." Indeed, the partial dissent appears to concede that its position might result in one or perhaps a few individuals fraudulently receiving benefits.

Government benefits, but only on their own terms, particularly where that insistence works a demonstrable disadvantage to the Government in the administration of the programs.

As the Court has recognized before, given the diversity of beliefs in our pluralistic society and the necessity of providing governments with sufficient operating latitude, some incidental neutral restraints on the free exercise of religion are inescapable. As a matter of legislative policy, a legislature might decide to make religious accommodations to a general and neutral system of awarding benefits,[19] "[b]ut our concern is not with the wisdom of legislation but with its constitutional limitation." *Braunfeld* v. *Brown*, 366 U. S. 599, 608 (1961) (plurality opinion). We conclude that the Congress' refusal to grant appellees a special exemption does not violate the Free Exercise Clause.

The judgment of the District Court is vacated and the case is remanded.

It is so ordered.

JUSTICE BLACKMUN, concurring in part.

I join only Parts I and II of the opinion written by THE CHIEF JUSTICE.

In August 1983, appellees Stephen J. Roy and Karen Miller sued to prevent the Government from requiring them to provide a social security number for their 2-year-old daughter, Little Bird of the Snow, as a condition for obtaining food stamps and welfare benefits for the child. They object to the social security number requirement because of their sincere religious conviction that the Government's widespread use of a unique numerical identifier for their daughter will deprive her of spiritual power. After it developed at trial that the Government already had a social security number for Little Bird of the Snow, the District Court enjoined the Government not only from denying benefits to her based on her parents' failure to provide a social security number, but also from using or disseminating the number already in the Government's possession until the child's 16th birthday. App. to Juris. Statement 25a.

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[19] An exemption adopted by Congress to accommodate religious beliefs such as appellees' would not violate the First Amendment's Establishment Clause. See *Sherbert* v. *Verner*, 374 U. S. 398, 409–410 (1963).

I agree with the Court that the District Court erred in enjoining the Government's internal use of Little Bird of the Snow's social security number. It is easy to understand the rationale for that part of the District Court's injunction: appellees argue plausibly that the Government's threat to put the social security number into active use if they apply for benefits for their daughter requires them to choose between the child's physical sustenance and the dictates of their faith, the same dilemma created by the Government's initial requirement that appellees themselves supply a social security number for Little Bird of the Snow. Cf. *Sherbert* v. *Verner*, 374 U. S. 398, 404 (1963). They claim that, absent some compelling state interest, the Government should refrain from acting in ways that appellees believe on religious grounds will harm their daughter's spiritual development.

Although this argument has some facial appeal, I conclude, for the reasons stated in Part II of the Court's opinion, that it stretches the Free Exercise Clause too far. Consequently, I agree that the portion of the District Court's judgment that enjoins the Government from using or disseminating the social security number already assigned to Little Bird of the Snow must be vacated. I would also vacate the remainder of the judgment and remand the case for further proceedings, because once the injunction against use or dissemination is set aside, it is unclear on the record presently before us whether a justiciable controversy remains with respect to the rest of the relief ordered by the District Court. Roy and Miller evidently objected to the social security number requirement primarily because they did not want the *Govern-*

ment to be able to use a unique numerical identifier for Little Bird of the Snow, and that injury cannot be redressed if, as the Court today holds, the Government cannot be enjoined from using the pre-existing number. It is possible, however, that appellees still would have an independent religious objection to their being forced to cooperate actively with the Government by themselves providing their daughter's social security number on benefit applications. Cf. *United States* v. *Lee*, 455 U. S. 252, 257 (1982); *Thomas* v. *Review Board of Indiana Employment Security Div.*, 450 U. S. 707, 711 (1981).

In my view, the record is ambiguous on this score. In rejecting the Government's argument that the existence of the number rendered the case moot, the District Court found that Roy "feels compelled by his religious belief to avoid any use of that number and, to that end, has refused to provide the number to the Defendants in order to receive welfare benefits for Little Bird of the Snow." *Roy* v. *Cohen*, 590 F. Supp. 600, 608 (MD Pa. 1984). It is unclear whether the "use" to which the District Court referred included use by Roy and Miller, or just the more extensive use of the number by the Government. And even if the court meant to refer only to use by the Government, it is not clear that appellees do not also have an independent religious objection to the requirement that *they* provide a social security number for their daughter.

On the other hand, even if appellees do have such an objection, vacating the District Court's injunction against governmental use or dissemination of the number may moot this case in other ways. Regardless of whether Roy and Miller are required to provide their daughter's social security number on applications for benefits, they may simply be unwilling to apply for benefits without an assurance that the application will not trigger the use of the number. Conversely, it is possible that the Government, in a welcome display of reasonableness, will decide that since it already has a social security number for Little Bird of the Snow, it will not insist that appellees resupply it.[1]

Since the proceedings on remand might well render unnecessary any discussion of whether appellees constitutionally may be required to provide a social security number for Little Bird of the Snow in order to obtain Government assistance on her behalf, that question could be said not to be properly before us. I nonetheless address it, partly because the rest of the Court has seen fit to do so, and partly because I think it is not the kind of difficult constitutional question that we should refrain from deciding except when absolutely necessary. Indeed, for the reasons expressed by JUSTICE O'CONNOR, see *post*, at 726–732, I think the question requires nothing more than a straightforward application of

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[1] Unfortunately, I cannot agree that such flexibility on the Government's part is assured either by the Government's earlier argument to the District Court that the case should be dismissed as moot, or by regulations providing special assistance to handicapped applicants and applicants who cannot read and write English. Cf. *ante*, at 701–702, n. 7 (opinion of BURGER, C. J.); *post*, at 720 (STEVENS, J., concurring in part and concurring in result). Before this Court, the Government concedes only that "*it would not be an unreasonable construction* of the statutes [at issue in this case] to conclude that they are satisfied by the government's ability to use [social security numbers] already in its possession, as is the case with Little Bird of the Snow, or by the government's ability to assign (and then use) [a number] for a person who refuses to apply for one." Brief for Appellants 46, n. 19 (emphasis added). What the Government does not say is that it in fact will adopt this construction, which it does not appear to have followed in the past. It is worth recalling that the Government's response to appellees' refusal to supply a social security number for their daughter was not to assign her a number unilaterally, or to offer to do so, but rather to cut off benefits for the child.

Given THE CHIEF JUSTICE's contrary view that the Government "undoubtedly" will not insist that appellees themselves provide a social security number for Little Bird of the Snow, see *ante*, at 702, n. 7, I am at a loss to understand why THE CHIEF JUSTICE believes there is still a live controversy.

Sherbert, *Thomas*, and *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972).[2] If it proves necessary to reach the issue on remand, I agree with JUSTICE O'CONNOR that, on the facts as determined by the District Court, the Government may not deny assistance to Little Bird of the Snow solely because her parents' religious convictions prevent them from supplying the Government with a social security number for their daughter.

JUSTICE STEVENS, concurring in part and concurring in the result.

Members of the Abenaki Indian Tribe are unquestionably entitled to the same constitutional protection against governmental action "prohibiting the free exercise" of their religion as are the adherents of other faiths.[1] Our respect for the sincerity of their religious beliefs does not, however, relieve us from the duty to identify the precise character of the two quite different claims that the parents of Little Bird of the Snow have advanced. They claim, first, that they are entitled to an injunction preventing the Government from making any use of a Social Security number assigned to Little Bird of the Snow; and second, that they are entitled to receive a full allowance of food stamps and cash assistance for Little Bird of the Snow without providing a Social Security number for her.

As the Court holds in Part II of its opinion, which I join, the first claim must fail because the Free Exercise Clause does not give an individual the right to dictate the Government's method of recordkeeping. The second claim, I submit, is either moot or not ripe for decision.

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[2] I do not share JUSTICE STEVENS' narrow view of *Sherbert* and *Thomas*. Compare *post*, at 722, n. 17, with *Goldman* v. *Weinberger*, 475 U. S. 503, 524 (1986) (BLACKMUN, J., dissenting). Consequently, I have no occasion to consider separately, as he does, the "hypothetical questions," *post*, at 723, that would arise if the Government refused to grant religious objectors an exemption from the social security number requirement, while simultaneously offering comparable exemptions and special assistance to applicants who are prevented in other ways from completing the required application forms. See *post*, at 720–722.

[1] The First Amendment provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

I

In order to understand the precise nature and current posture of appellees' claims, it is necessary to emphasize an extremely unusual feature of this case. At the outset of the litigation, the parties assumed—indeed, they stipulated to—a critical fact that was discovered to be inaccurate on the last day of the trial. Although the parties believed that Little Bird of the Snow did not have a Social Security number, the District Court found, and the parties now agree, that she has had a Social Security number since birth. The contrary belief had been central to the parties' perception of the litigation, and to the requested relief. It is thus also central to the state of the record as we find it.

At the state agency administrative hearing on the threatened withdrawal of certain benefits, the issue had been framed as whether to affirm a decision "determining the appellant's daughter, Little Bird of the Snow, ineligible for public assistance and Medical Assistance because the appellant would not apply for a Social Security Number for her."[2] In their complaint, Little Bird's parents alleged that "[t]he sole basis" for the denial of welfare benefits was "Mr. Roy's refusal to obtain a Social Security Number for Little Bird of the Snow,"[3] and thus requested injunctive relief, damages, and benefits. In the statement of "undisputed facts," the parties stipulated that Little Bird of the Snow did not have a Social Security number.[4] In the District Court's opinion denying summary judgment, the court began its opinion by observing that Roy and Miller "have refused to obtain a Social Security number for their two-year-old daughter, Little Bird of the Snow, on the ground that doing so would be contrary to their Native Abenaki Indian religious beliefs."[5] At trial, Roy's counsel introduced his case by emphasizing that Little Bird of the Snow, unlike the other members of the family, did not have a Social Security number and thus had not been exposed to the evil that the number represents.[6] In Roy's own testimony, he emphasized the evil that would flow from *obtaining* a number.[7] On the last day of trial, however, in response to questions, a federal official inquired, during a court recess, whether Little Bird of the Snow already had a Social Security number and discovered that she had been assigned a Social Security number at birth.[8]

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[2] Department of Public Welfare Adjudication, Complaint, Ex. A, p. 2.

[3] Complaint ¶ 11.

[4] Statement of Undisputed Facts ¶ 6, App. 13 ("With the exception of Little Bird of the Snow, [the members of the Roy family] all have Social Security Numbers"); ¶ 20, App. 14 ("The sole basis for these actions [the reduction of AFDC and medical assistance] was Mr. Roy's refusal to obtain a Social Security Number for Little Bird of the Snow").

This discovery had a dramatic impact on the litigation, and on the judgment under review. Because there was no longer any apparent basis for the dispute, the Government suggested that the case had become moot.[9] Roy, however, responded to the discovery by changing his request for relief and asking for a cancellation of the existing number.[10]

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[5] App. to Juris. Statement 27a.

[6] See App. 52–53. ("Mr. Roy has a Social Security number, as does his eldest daughter, Renee; but, as Mr. Roy will explain, the number was obtained before he became aware of what he perceives as a potential for evil of these numbers; and he will tell you that once that number is provided the evil is done and continuing to do so has no further effect; but with respect to Little Bird of the Snow, he simply cannot do so").

[7] "[Q.] Mr. Roy, could you explain why obtaining a Social Security Number for Little Bird of the Snow would be contrary to your religious beliefs as a native Abenaki?

"A. Yes. Because we felt that this number would be used to rob her of her ability to have greater power in that this number is a unique number. It serves unique purposes. It's applied to her and only her; and being applied to her, that's what offends us, and we try to keep her person unique, and we try to keep her spirit unique, and we're scared that if we were to use this number, she would lose control of that and she would have no ability to protect herself from any evil that that number might be used against her." *Id.*, at 85.

[8] *Id.*, at 442–443.

Concluding that the discovery did not moot the case,[11] the District Court denied the request for damages and benefits, but granted injunctive relief. The injunction—the judgment that we are considering—contains two basic components. First, the Secretary of Health and Human Services is "permanently restrained from making any use of the social security number which was issued in the name of Little Bird of the Snow Roy and from disseminating the number to any agency, individual, business entity, or any other third party."[12] Second, the federal and state defendants are enjoined until Little Bird of the Snow's 16th birthday from denying Roy cash assistance, medical assistance, and food stamps "because of the Plaintiffs' refusal to provide a social security number for her."[13] Of course, if the injunction preventing the Secretary from making use of the already existing number had not been granted, there would have been no apparent impediment to providing the benefits that had previously been denied.

As the case comes to us, the first question to be decided is whether the District Court erred in effectively canceling the number that had already been issued for Little Bird of the Snow and that established the appellees' eligibility for the benefits in dispute. The Court correctly holds that the District Court did err and that "the portion of the District Court's injunction that permanently restrained the Secretary from making any use of the Social Security number that had been issued in the name of Little Bird of the Snow Roy must be vacated." *Ante*, at 701. Having so held, however, the Court should pause to consider whether any other constitutional issue need be addressed. For, as the Court demonstrates, an objection to the Government's use of a Social Security number, and a possible objection to "providing" the number when the Government already has it, pose very different constitutional problems.

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[9] See *id.*, at 514–515 (argument of Deputy Attorney General of Pennsylvania); *id.*, at 521 (argument of Attorney for United States Dept. of Justice); Record, Doc. No. 68, p. 2 (federal defendants' motion to dismiss).

[10] Record, Doc. No. 65, pp. 2–3.

[11] See *Roy* v. *Cohen*, 590 F. Supp. 600, 605 (MD Pa. 1984) (finding of fact 33) ("Roy believes that the establishment of a social security number for Little Bird of the Snow, without more, has not 'robbed her spirit,' but widespread use of the social security number by the federal or state governments in their computer systems would have that effect").

[12] App. to Juris. Statement 24a.

[13] *Id.*, at 25a.

II

Once we vacate the injunction preventing the Government from making routine use of the number that has already been assigned to Little Bird of the Snow, there is nothing disclosed by the record to prevent the appellees from receiving the payments that are in dispute. Indeed, since the Government itself suggested to the District Court that the case had become moot as soon as it was learned that a Social Security number already existed, it is obvious that the Government perceives no difficulty in making the requested payments in the future. The only issue that prevented the case from becoming moot was the claim asserted by Roy that he was entitled to an injunction that effectively canceled the existing number. Since that issue has now been resolved, nothing remains of the case.

Neither Roy nor the Government has pointed to anything in the record suggesting that Roy will be under any further obligation to "provide" a Social Security number for Little Bird of the Snow. Even if one makes the unsupported assumption that Roy may object to filing certain forms in the future, there is a conspicuous lack of evidence and findings concerning the extent to which such requirements might impose a burden either on Roy, or on any other person who finds difficulty in providing information on pertinent forms.

The absence of this information in the record is significant. Current regulations suggest that assistance for such difficulties may well be available in the programs at issue,[14] particularly for those with mental, physical, and linguistic handicaps that prevent completion of the required forms,[15] or other required steps in the application process.[16] To the extent that

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[14] See, *e. g.*, 7 CFR § 273.2(c)(1) (1985) ("The household shall be advised that it . . . may file an incomplete application form as long as the form contains the applicant's name and address and is signed by a responsible member of the household or the household's authorized representative").

[15] See 7 CFR § 282.17(c)(3)(v) (1985) ("Households which require special assistance in order to apply for food stamps if that special assistance will not be available for completing the monthly reports. Special assistance shall include authorized representatives to complete monthly reports, home visits or telephone reporting in lieu of the report form. Such households may be comprised of blind, mentally or physically disabled persons, persons whose reading and writing skills are so limited that they cannot complete monthly reports on their own, or non-English speaking persons residing in project areas where the bilingual requirement of § 272.4(c) do not apply").

[16] See 7 CFR § 273.2(e)(2) (1985) ("The office interview shall be waived if requested by any household which is unable to appoint an authorized representative and which has no household members able to come to the food stamp office because they are 65 years of age or older, or are mentally or physically handicapped"); *ibid.* ("The State agency shall waive the office interview on a case-by-case basis for any household which is unable to appoint an authorized representative and which has no household members able to come to the food stamp office because of transportation difficulties or similar hardships which the State agency determines warrants a waiver of the office interview. These hardship conditions include, but are not limited to: Illness, care of a household member, prolonged severe weather, or work hours which preclude in-office interview").

Indeed, the regulations suggest that there may be a limited exception to the Social Security number requirement itself. See 7 CFR § 273.6 (b)(2) (1985) ("For those individuals required to provide an SSN who do not have one, the State agency shall act as follows. . . . If an individual applies through the State agency, the State agency shall complete the application for an SSN, Form SS-5"); 50 Fed. Reg. 10469 (1985) (proposed 7 CFR § 273.6(d)) ("In determining if good cause exists for failure to comply with the requirement to apply for or provide the State agency with an SSN, the other food stamp and welfare applicants are, in fact, offered exceptions and special assistance in response to their inability to "provide" required information, it would seem that a religious inability should be given no less deference. For our recent free exercise cases suggest that religious claims should not be disadvantaged in relation to other claims.[17]

These considerations highlight the fact that, if this case is not moot, it surely is not ripe. The case, as litigated, simply bears no resemblance to the currently abstract question about what the Government may require if it seeks a Social Security number that it already has.

Consistent with our longstanding principles of constitutional adjudication, we should decide nothing more than is actually necessary to dispose of the precise dispute before the Court,[18] and nothing more than is fairly presented by the

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State agency shall consider information from the household member, the Social Security Administration and the State agency . . . . Good cause does not include delays due to illness, lack of transportation or temporary absences, because SSA makes provisions for mail-in applications in lieu of applying in person. . . . If the household member(s) applying for an SSN has been unable to obtain the documents required by SSA, the State agency caseworker should make every effort to assist the individual(s) in obtaining these documents").

[17] In *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707 (1981), and *Sherbert* v. *Verner*, 374 U. S. 398 (1963), the granting of a religious exemption was necessary to prevent the treatment of religious claims less favorably than other claims. See *United States* v. *Lee*, 455 U. S. 252, 264, n. 3 (1982) (STEVENS, J., concurring in judgment) (In *Thomas* and *Sherbert*, "the treatment of the religious objection to the new job requirements as though it were tantamount to a physical impairment that made it impossible for the employee to continue to work under changed circumstances could be viewed as a protection against unequal treatment rather than a grant of favored treatment for the members of the religious sect").

[18] See *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 569 (1947) ("[C]onstitutional issues affecting legislation will not be determined . . . in broader terms than are required by the precise facts to which the ruling is to be applied"); *Coffman* v. *Breeze Corp.*, 323 U. S. 316, 324–325 (1945) ("[T]he Court will not pass upon the constitutionality of legislation . . . until

record and the factual findings.[19] Because the District Court has not made findings about the extent to which other exceptions and assistance are available for those who cannot, or do not, "provide" required information, and because there is nothing in the record to suggest that the Government will not pay the benefits in dispute as soon as the District Court's injunction against the use of the number has been vacated, I concur in the judgment vacating the remainder of the injunction. No matter how interesting, or how clear their answers may appear to be, however, I would not address the hypothetical questions debated by THE CHIEF JUSTICE and JUSTICE O'CONNOR because they are not properly presented by the record in this case.[20]

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it is necessary to do so to preserve the rights of the parties"); *Liverpool, New York and Philadelphia S.S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885) (This Court "is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is applied").

[19] See *Bender* v. *Williamsport Area School Dist.*, 475 U. S. 534, 542, n. 5 (1986) ("We have frequently recognized the importance of the facts and the factfinding process in constitutional adjudication"); *Minnick* v. *California Dept. of Corrections*, 452 U. S. 105, 123 (1981) ("In this case our analysis of the question whether the federal constitutional issues may be affected by additional proceedings in the state courts . . . is . . . affected by ambiguities in the record"); *England* v. *Louisiana Board of Medical Examiners*, 375 U. S. 411, 416 (1964) ("How the facts are found will often dictate the decision of federal claims"); *Townsend* v. *Sain*, 372 U. S. 293, 312 (1963) ("It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues"); *Wiener* v. *United States*, 357 U. S. 349, 352 (1958) ("The versatility of circumstances often mocks a natural desire for definitiveness"); *Hammond* v. *Schappi Bus Line*, 275 U. S. 164, 171–172 (1927) ("Before any of the questions suggested, which are both novel and of far reaching importance, are passed upon by this Court, the facts essential to their decision should be definitely found by the lower courts upon adequate evidence").

[20] Curiously, in explaining why they discourse at length on constitutional questions, THE CHIEF JUSTICE and JUSTICE O'CONNOR appear to rely on

JUSTICE O'CONNOR, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, concurring in part and dissenting in part.

I join Parts I and II of THE CHIEF JUSTICE's opinion and I would vacate only a portion of the injunction issued by the District Court.

I

I believe that appellees cannot pursue their free exercise claim based solely on the actions of the Government with respect to the use of a Social Security number already in its possession, or with respect to any other identification number the Government may wish to assign and use in connection with its administration of its welfare assistance program. Accordingly, I join Parts I and II of THE CHIEF JUSTICE's opinion, and I would vacate that portion of the District Court's judgment that enjoins the Government from using or disseminating the Social Security number already assigned to Little Bird of the Snow.

In all, eight Members of the Court believe that the District Court's injunction was overbroad in preventing the Government from using information already in its possession. See *ante*, at 699–701 (opinion of BURGER, C. J., joined by POWELL and REHNQUIST, JJ.); *ante*, at 716–717 (STEVENS, J., concurring in part and concurring in the result); *ante*, at 713 (BLACKMUN, J., concurring in part); *supra* this page.

A logical next step on the facts of this case is to consider whether the case is moot. Only two Members of the Court

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different factual assumptions. Compare *ante*, at 702, n. 7 (BURGER, C. J.) (The "Government undoubtedly would be happy to 'supply' the number for appellees—*i. e.*, fill the number in on their applications—if this is what they wanted"), with *post*, at 725 (O'CONNOR, J., concurring in part and dissenting in part) ("The Government still refuses to concede that it should now provide welfare benefits to Little Bird of the Snow, even though it now claims to possess Little Bird of the Snow's Social Security number"). It is, of course, an elementary principle of judicial restraint that uncertainty about the facts should prevent unnecessary constitutional disquisitions.

believe that the case is, or may be, moot. See *ante*, at 720–723 (STEVENS, J., concurring in part and concurring in result) (stating that the case is moot or not ripe); *ante*, at 714–716 (BLACKMUN, J., concurring in part) (District Court should consider whether the case is moot). I agree with THE CHIEF JUSTICE, *ante*, at 701–702, n. 7, that the case is not moot.

The District Court enjoined the Government not only from disseminating or using the Social Security number already in its possession, but "from denying Plaintiff Roy cash assistance and medical assistance benefits for Little Bird of the Snow for the Plaintiffs' failure to provide a social security number for her." App. to Juris. Statement 24a. Because of this portion of the District Court's injunction, we continue to have before us a live case or controversy. Mr. Roy sought in part an injunction that "restrai[ns the Government] from denying cash assistance and medical assistance to Little Bird of the Snow for failure to provide a Social Security Number." Record, Doc. No. 65, Proposed Orders Submitted by Plaintiff 1–2. The District Court granted that relief. App. to Juris. Statement 24a. The Government still refuses to concede that it should now provide welfare benefits to Little Bird of the Snow, even though it now claims to possess Little Bird of the Snow's Social Security number, and even though the Solicitor General has been "advised by the Social Security Administration that the agency itself assigns [Social Security numbers] to persons who are required by federal law to have one but decline to complete an application." Brief for Appellants 46, n. 19. Because the Government contests the District Court's decision that the Government may not deny welfare benefits to Little Bird of the Snow despite its acknowledgment of appellees' sincere religious objections, Mr. Roy may properly press his suit. Although the Government properly challenges part of the District Court's injunction as overbroad, it seeks to overturn the rest of the injunction only on the grounds that the District Court improperly applied the substantive standards of the First Amendment.

II

Given that a majority of the Court believes that the Government may use and disseminate information already in its possession, and given that the case is not moot, there is probably less remaining in this case than meets the eye. The interest asserted by the Government before the District Court could be wholly served after accommodating appellees' sincere religious beliefs, and the interests remaining after vacating the overbroad portion of the injunction are certainly no more difficult to pursue.

The Government has identified its goal as preventing fraud and abuse in the welfare system, a goal that is both laudable and compelling. The District Court, however, soundly rejected the Government's assertion that provision of the Social Security number was necessary to prevent such fraud and abuse. Among the means for which the Social Security number is used to reduce such fraud is "cross-matching," in which various computerized lists are compared with the welfare rolls to detect unreported income, individuals claimed as part of more than one household, and other fraudulent practices. *Roy* v. *Cohen,* 590 F. Supp. 600, 606–607 (MD Pa. 1984). As now appears, the Government not only has the Social Security number it wants for Little Bird of the Snow, but it can also use it. But even under the erroneous assumption of the District Court that no such number was available for use, that court found as a fact that, while cross-matching is "more difficult" without Social Security numbers, "[t]he file on a particular benefit recipient can be identified and cross-matching performed, if the recipient's full name, date of birth, and parents' names are entered into the computerized systems." *Id.*, at 607. The District Court's generalized evaluation of the asserted indispensability of the Social Security number similarly undermines the Government's claim here:

> "*The government's interest* in preventing Little Bird of the Snow from fraudulently receiving welfare benefits *can be satisfied without requiring a social security num-*

ber for Little Bird of the Snow." *Ibid.* (emphasis added).

Faced with these facts, however, THE CHIEF JUSTICE not only believes appellees themselves must provide a Social Security number to the Government before receiving benefits, but he also finds it necessary to invoke a new standard to be applied to test the validity of Government regulations under the Free Exercise Clause. *Ante*, at 707–708. He would uphold any facially neutral and uniformly applicable governmental requirement if the Government shows its rule to be "a reasonable means of promoting a legitimate public interest." *Ante*, at 708. Such a test has no basis in precedent and relegates a serious First Amendment value to the barest level of minimal scrutiny that the Equal Protection Clause already provides. I would apply our long line of precedents to hold that the Government must accommodate a legitimate free exercise claim unless pursuing an especially important interest by narrowly tailored means.

This Court has stated:

> "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707, 717–718 (1981).

Indeed, THE CHIEF JUSTICE appears to acknowledge at least that the law at issue here involves governmental compulsion. See *ante*, at 704 ("[W]e do not believe that no government compulsion is involved"). The Free Exercise Clause is therefore clearly implicated in this case. See *Thomas* v. *Review Bd.*, *supra*, at 717–718; *Sherbert* v. *Verner*, 374 U. S. 398, 403–406 (1963).

Once it has been shown that a governmental regulation burdens the free exercise of religion, "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin* v. *Yoder*, 406 U. S. 205, 215 (1972). This Court has consistently asked the Government to demonstrate that unbending application of its regulation to the religious objector "is essential to accomplish an overriding governmental interest," *United States* v. *Lee*, 455 U. S. 252, 257–258 (1982), or represents "the least restrictive means of achieving some compelling state interest," *Thomas* v. *Review Bd.*, *supra*, at 718. See also *Braunfeld* v. *Brown*, 366 U. S. 599, 607 (1961); *Sherbert* v. *Verner*, *supra*, at 406. Only an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms as the price for an equal share of the rights, benefits, and privileges enjoyed by other citizens.

Granting an exemption to Little Bird of the Snow, and to the handful of others who can be expected to make a similar religious objection to providing the Social Security number in conjunction with the receipt of welfare benefits, will not demonstrably diminish the Government's ability to combat welfare fraud. The District Court found that the governmental appellants had hardly shown that a significant number of other individuals were likely to make a claim similar to that at issue here:

> "There have been four reported cases involving challenges to the social security number requirement for welfare benefits based upon the contention that the number violates sincerely held religious beliefs of the welfare recipient." 590 F. Supp., at 607.

Cf. *United States* v. *Lee*, *supra* (refusing request for exemption from mandatory taxation); *Gillette* v. *United States*, 401 U. S. 437 (1971) (refusing request for exemption from involuntary military service). The danger that a religious exemption would invite or encourage fraudulent applications seeking to avoid cross-matching performed with the use of Social Security numbers is remote on the facts as found by the District Court: few would-be lawbreakers would risk arousing suspicion by requesting an exemption granted only to a very few. And the sincerity of appellees' religious beliefs is here undisputed. There is therefore no reason to believe that our previous standard for determining whether the Government must accommodate a free exercise claim does not apply.

Bob Jones University v. *United States,* 461 U. S. 574 (1983), does not support THE CHIEF JUSTICE's analysis. The Court stated in that case:

> "The governmental interest at stake here is compelling. . . . [T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of this Nation's constitutional history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs. The interests asserted by petitioners cannot be accommodated with that compelling governmental interest, see *United States* v. *Lee, supra,* at 259–260; and no 'less restrictive means,' see *Thomas* v. *Review Board of Indiana Employment Security Div., supra,* at 718, are available to achieve the governmental interest." *Id.,* at 604 (footnotes omitted).

See also *id.,* at 603 ("'The state may justify a limitation on religious liberty by showing that it is *essential* to accomplish an *overriding* governmental interest'") (emphasis added) (quoting *United States* v. *Lee, supra,* at 257–258). It is clear that the Court in *Bob Jones University* did not adopt anything like the legitimate interest/rational means test propounded by THE CHIEF JUSTICE, but rather continued to require the Government to show pursuit of an especially important interest by narrowly tailored means. In addition, the interest that the Court in *Bob Jones University* balanced against asserted religious interests was not merely a compelling governmental interest but a *constitutional* interest. Here, although prevention of welfare fraud is concededly a compelling interest, the Government asserts only administrative efficiency as its reason for refusing to exempt appellees from furnishing the Social Security number. The District Court found that assertion sorely wanting, and our conclusion that part of the resulting injunction was overbroad only makes the Government's assertion less plausible. Surely the fact that the Court was willing in *Bob Jones University* to give overriding weight to the Government's interest in eradicating the scourge of racial discrimination does not mean that the Court must also give overriding weight to the unanchored anxieties of the welfare bureaucracy.

Hamilton v. *Regents of University of California*, 293 U. S. 245 (1934), also fails to support THE CHIEF JUSTICE's construction of a new test. When the Court decided *Hamilton*, it had not yet applied, and did not in *Hamilton* apply, the Free Exercise Clause to actions of the States. Cf. *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940). The Court's discussion in *Hamilton* of the state university's decision to require military training is therefore limited to a generalized analysis under the Fourteenth Amendment of whether the State's policy deprived the would-be students of "life, liberty, or property." See 293 U. S., at 261–262. The Court concluded that no such deprivation was involved when the State "ha[d] not drafted or called [the individuals] to [war]." *Id.*, at 262.

This Court's opinions have never turned on so slender a reed as whether the challenged requirement is merely a "reasonable means of promoting a legitimate public interest." *Ante*, at 708 (opinion of BURGER, C. J.). THE CHIEF JUSTICE appears to believe that the added inconvenience to the State of administering a selective exemption overbalances any burden on individual religious exercise. But this Court has held that administrative inconvenience is not alone sufficient to justify a burden on free exercise unless it creates problems of substantial magnitude. See *Sherbert* v. *Verner*, 374 U. S., at 408–409. And as Part II of THE CHIEF JUSTICE's opinion makes clear, there is essentially no administrative burden imposed on the Government in this case.

Appellants have rested their case on vague allegations of administrative inconvenience and harm to the public fisc that are wholly unsubstantiated by the record and the findings of the District Court. The Court simply cannot, consistent with its precedents, distinguish this case from the wide variety of factual situations in which the Free Exercise Clause indisputably imposes significant constraints upon government. Indeed, five Members of the Court agree that *Sherbert* and *Thomas*, in which the government was required to accommodate sincere religious beliefs, control the outcome of this case to the extent it is not moot. See *ante*, at 716 (BLACKMUN, J., concurring in part); *post*, at 733 (WHITE, J., dissenting); *supra*, at 728–730.

THE CHIEF JUSTICE's distinction between this case and the Court's previous decisions on free exercise claims—that here "it is appellees who seek benefits from the Government and who assert that . . . they should be excused from compliance with a condition that is binding on all other persons who seek the same benefits from the Government," *ante*, at 703—has been directly rejected. The fact that the underlying dispute involves an award of benefits rather than an exaction of penalties does not grant the Government license to apply a different version of the Constitution:

> "[Welfare] benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are 'a "privilege" and not a "right."'" *Shapiro* v. *Thompson*, 394 U. S. 618, 627 n. 6 (1969). Relevant constitu-

> tional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation, *Sherbert* v. *Verner*, 374 U. S. 398 (1963) . . . ." *Goldberg* v. *Kelly*, 397 U. S. 254, 262 (1970) (footnote omitted).

See also *Sherbert* v. *Verner*, *supra*, at 404 ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege"). The fact that appellees seek exemption from a precondition that the Government attaches to an award of benefits does not, therefore, generate a meaningful distinction between this case and one where appellees seek an exemption from the Government's imposition of penalties upon them. Even if the Founding Fathers did not live in a society with the "broad range of benefits" and "complex programs" that the Federal Government administers today, *ante*, at 707 (opinion of BURGER, C. J.), they constructed a society in which the Constitution placed express limits upon governmental actions limiting the freedoms of that society's members. The rise of the welfare state was not the fall of the Free Exercise Clause.

Our precedents have long required the Government to show that a compelling state interest is served by its refusal to grant a religious exemption. The Government here has clearly and easily met its burden of showing that the prevention of welfare fraud is a compelling governmental goal. If the Government could meet its compelling needs only by refusing to grant a religious exemption, and chose a narrowly tailored means to do so, then the Government would prevail. But the Government has failed to show that granting a religious exemption to those who legitimately object to providing a Social Security number will do any harm to its compelling interest in preventing welfare fraud.

I would merely vacate that portion of the injunction issued by the District Court that enjoins the Government from using or disseminating the Social Security number already in its possession.

JUSTICE WHITE, dissenting.

Being of the view that *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707 (1981), and *Sherbert* v. *Verner*, 374 U. S. 398 (1963), control this case, I cannot join the Court's opinion and judgment.

UNITED STATES *v.* DION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 85–246. Argued March 25, 1986—Decided June 11, 1986

The Bald Eagle Protection Act (Eagle Protection Act) makes it a federal crime to hunt the bald eagle or the golden eagle, except that such hunting may be authorized, pursuant to a permit issued by the Secretary of the Interior, "for the religious purposes of Indian tribes" or for certain other narrow purposes compatible with preservation of those species. The Endangered Species Act imposes a similar ban on the hunting of the bald eagle. Respondent, a member of the Yankton Sioux Tribe, was convicted after a jury trial in Federal District Court of, *inter alia*, the shooting of four bald eagles in violation of the Endangered Species Act, but the court before trial dismissed a charge of shooting a golden eagle in violation of the Eagle Protection Act. The Court of Appeals reversed the convictions and affirmed the dismissal of the other charge, holding that members of the Tribe have a right under an 1858 treaty to hunt bald and golden eagles within the Yankton Reservation for noncommercial purposes, and that neither of the Acts in question abrogated this treaty right.

Held: The Court of Appeals erred in recognizing respondent's treaty defense to the prosecutions. Pp. 738–746.

(a) The Eagle Protection Act abrogated the rights of members of the Yankton Sioux Tribe under the 1858 treaty to hunt the bald or golden eagle on the Yankton Reservation. Congress' intention to abrogate Indian treaty rights must be clear and plain. Here, such intention is strongly suggested on the face of the Eagle Protection Act, and this view is supported by the legislative history. More particularly, Congress' action in 1962 in amending the Act to extend its ban to the golden eagle and authorizing the Secretary to issue permits for Indian hunting reflected an unmistakable and explicit legislative policy choice that Indian hunting of the bald or golden eagle, except pursuant to permit, is inconsistent with the need to preserve those species. Pp. 738–745.

(b) Since the Eagle Protection Act divested respondent of his treaty right to hunt bald eagles, he had no such right to hunt bald eagles that he could assert as a defense to the Endangered Species Act charge. Pp. 745–746.

762 F. 2d 674, reversed in part and remanded.

MARSHALL, J., delivered the opinion for a unanimous Court.

Jeffrey P. Minear argued the cause *pro hac vice* for the United States. On the briefs were *Solicitor General Fried, Assistant Attorney General Habicht, Deputy Solicitor General Wallace, Harriet S. Shapiro, Donald A. Carr, Claire L. McGuire,* and *James C. Kilbourne.*

Terry L. Pechota by appointment of the Court, 474 U. S. 978, argued the cause and filed a brief for respondent.*

JUSTICE MARSHALL delivered the opinion of the Court.

Respondent Dwight Dion, Sr., a member of the Yankton Sioux Tribe, was convicted of shooting four bald eagles on the Yankton Sioux Reservation in South Dakota in violation of the Endangered Species Act, 87 Stat. 884, as amended, 16 U. S. C. § 1531 *et seq.* (1982 ed. and Supp. II).[1] The District Court dismissed before trial a charge of shooting a golden eagle in violation of the Bald Eagle Protection Act, 54 Stat. 250, 16 U. S. C. § 668 *et seq.* (Eagle Protection Act). Dion was also convicted of selling carcasses and parts of eagles and other birds in violation of the Eagle Protection Act and the Migratory Bird Treaty Act, 40 Stat. 755, as amended, 16 U. S. C. § 703 *et seq.* The Court of Appeals for the Eighth Circuit affirmed all of Dion's convictions except those for

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*Briefs of *amici curiae* urging reversal were filed for the Environmental Defense Fund, Inc., et al. by *Michael J. Bean;* and for the International Association of Fish and Wildlife Agencies by *Paul A. Lenzini.*

Briefs of *amici curiae* urging affirmance were filed for the Assiniboine and Sioux Tribes of the Fort Peck Reservation et al. by *Harry R. Sachse* and *Arthur Lazarus, Jr.;* for the Hopi Indian Tribe by *Michael P. O'Connell;* for the National Congress of American Indians et al. by *Henry J. Sockbeson* and *Steven C. Moore;* and for the Seminole Indian Tribe of Florida by *Charles A. Hobbs* and *Jerry C. Straus.*

[1] The jury verdict at trial did not conclusively establish that Dion is a member of the Tribe or that the killings took place on the reservation. See 752 F. 2d 1261, 1270 (1985) (indicating that those questions remain open for determination on remand). Both parties, however, agree in this Court that Dion is a member of the Yankton Sioux Tribe. Brief for United States 10; Brief for Respondent 2. Dion testified at trial that the birds were all killed on the reservation, the Eighth Circuit assumed that fact for the purposes of its opinion, and we shall do the same.

shooting bald eagles in violation of the Endangered Species Act. 752 F. 2d 1261, 1270 (1985) (en banc); 762 F. 2d 674, 694 (1985) (panel opinion). As to those, it stated that Dion could be convicted only upon a jury determination that the birds were killed for commercial purposes. 752 F. 2d, at 1270. It also affirmed the District Court's dismissal of the charge of shooting a golden eagle in violation of the Eagle Protection Act. *Ibid.* We granted certiorari, 474 U. S. 900 (1985), and we now reverse the judgment of the Court of Appeals insofar as it reversed Dion's convictions under the Endangered Species Act and affirmed the dismissal of the charge against him under the Eagle Protection Act.

I

The Eagle Protection Act by its terms prohibits the hunting of the bald or golden eagle anywhere within the United States, except pursuant to a permit issued by the Secretary of the Interior. The Endangered Species Act imposes an equally stringent ban on the hunting of the bald eagle. The Court of Appeals for the Eighth Circuit, however, sitting en banc, held that members of the Yankton Sioux Tribe have a treaty right to hunt bald and golden eagles within the Yankton Reservation for noncommercial purposes.[2] It further held that the Eagle Protection Act and Endangered Species Act did not abrogate this treaty right. It therefore directed that Dion's convictions for shooting bald eagles be vacated, since neither the District Court nor the jury made any explicit finding whether the killings were for commercial or noncommercial purposes.[3]

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[2] The court held that tribal members have no treaty right to sell eagles, or to hunt eagles for commercial purposes. 752 F. 2d, at 1264–1265. Dion does not challenge that holding here, and its validity is not before us.

[3] On remand from the en banc court, an Eighth Circuit panel rejected a religious freedom claim raised by Dion. Dion does not pursue that claim here, and accordingly we do not consider it.

A statement made by the panel in rejecting that claim, though, casts some doubt on whether the issue of whether Dion had a treaty right to kill

The Court of Appeals relied on an 1858 treaty signed by the United States and by representatives of the Yankton Tribe. Treaty with the Yancton (1858 spelling) Sioux, Apr. 19, 1858, 11 Stat. 743. Under that treaty, the Yankton ceded to the United States all but 400,000 acres of the land then held by the Tribe. The treaty bound the Yanktons to remove to, and settle on, their reserved land within one year. The United States in turn agreed to guarantee the Yanktons quiet and undisturbed possession of their reserved land, and to pay to the Yanktons, or expend for their benefit, various moneys in the years to come. The area thus reserved for the Tribe was a legally constituted Indian reservation, see *Minnesota* v. *Hitchcock*, 185 U. S. 373, 389–390 (1902); *Wood* v. *Jameson*, 130 N. W. 2d 95 (S. D. 1964). The treaty did not place any restriction on the Yanktons' hunting rights on their reserved land.

All parties to this litigation agree that the treaty rights reserved by the Yankton included the exclusive right to hunt and fish on their land. See Brief for United States 19; Brief

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eagles for noncommercial purposes is squarely before us. The panel stated: "The record reveals that Dion, Sr. was killing eagles and other protected birds for commercial gain . . . ." 762 F. 2d 674, 680 (1985). Notwithstanding its statement that Dion's killings were for commercial gain, apparently inconsistent with the en banc court's refusal to pass on that issue, it issued a judgment vacating Dion's convictions for shooting bald eagles "pursuant to the opinion of this Court *en banc*." *Id.*, at 694.

We find that this case properly presents the issue whether killing eagles for noncommercial purposes is outside the scope of the Eagle Protection Act and the Endangered Species Act. The Eighth Circuit panel did not disturb the en banc court's holding that Dion cannot be convicted absent a jury determination of whether the killings were for a commercial purpose, and vacated his convictions for shooting bald eagles because the jury made no such finding. The Solicitor General argues that Dion's convictions should have been affirmed whether the killings were for commercial or noncommercial purposes. The correctness of the holding below that killing for noncommercial purposes is not punishable, therefore, is squarely before us.

for Respondent 7.[4] As a general rule, Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them, unless such rights were clearly relinquished by treaty or have been modified by Congress. F. Cohen, Handbook of Federal Indian Law 449 (1982) (hereinafter Cohen). These rights need not be expressly mentioned in the treaty. See *Menominee Tribe* v. *United States*, 391 U. S. 404 (1968); *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78 (1918). Those treaty rights, however, little avail Dion if, as the Solicitor General argues, they were subsequently abrogated by Congress. We find that they were.[5]

II

It is long settled that "the provisions of an act of Congress, passed in the exercise of its constitutional authority, . . . if clear and explicit, must be upheld by the courts, even in contravention of express stipulations in an earlier treaty" with a foreign power. *Fong Yue Ting* v. *United States*, 149 U. S. 698, 720 (1893); cf. *Goldwater* v. *Carter*, 444 U. S. 996 (1979). This Court applied that rule to congressional abrogation of Indian treaties in *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 566 (1903). Congress, the Court concluded, has the power "to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so." *Ibid.*

We have required that Congress' intention to abrogate Indian treaty rights be clear and plain. Cohen 223; see also

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[4] Such treaty rights can be asserted by Dion as an individual member of the Tribe. See *United States* v. *Winans*, 198 U. S. 371, 381 (1905); *Kimball* v. *Callahan*, 590 F. 2d 768, 773 (CA9), cert. denied, 444 U. S. 826 (1979); see also *United States* v. *Felter*, 752 F. 2d 1505, 1509 (CA10 1985).

[5] We therefore do not address the Solicitor General's argument that Dion's hunting is outside the scope of the treaty right because that right does not protect hunting "to extinction."

United States v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 353 (1941). "Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights . . . ." *Washington* v. *Washington Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 690 (1979). We do not construe statutes as abrogating treaty rights in "a backhanded way," *Menominee Tribe* v. *United States*, 391 U. S., at 412; in the absence of explicit statement, "'the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.'" *Id.*, at 413, quoting *Pigeon River Co.* v. *Cox Co.*, 291 U. S. 138, 160 (1934). Indian treaty rights are too fundamental to be easily cast aside.[6]

We have enunciated, however, different standards over the years for determining how such a clear and plain intent must be demonstrated. In some cases, we have required that Congress make "express declaration" of its intent to abrogate treaty rights. See *Leavenworth, L., & G. R. Co.* v. *United States*, 92 U. S. 733, 741–742 (1876); see also Wilkinson & Volkman 627–630, 645–659. In other cases, we have looked to the statute's "'legislative history'" and "'surrounding circumstances'" as well as to "'the face of the Act.'" *Rosebud Sioux Tribe* v. *Kneip*, 430 U. S. 584, 587 (1977), quoting *Mattz* v. *Arnett*, 412 U. S. 481, 505 (1973). Explicit statement by Congress is preferable for the purpose of ensuring legislative accountability for the abrogation of treaty rights, cf. *Seminole Nation* v. *United States*, 316 U. S. 286, 296–297 (1942). We have not rigidly interpreted that preference, however, as a *per se* rule; where the evidence of congressional intent to abrogate is sufficiently compelling, "the weight of authority indicates that such an intent can also be found by a reviewing court from clear and reliable evidence in the legislative history of a statute." Cohen 223. What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.

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[6] See also Wilkinson & Volkman, Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time Is That?, 63 Calif. L. Rev. 601 (1975) (hereinafter Wilkinson & Volkman).

A

The Eagle Protection Act renders it a federal crime to "take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner any bald eagle commonly known as the American eagle or any golden eagle, alive or dead, or any part, nest, or egg thereof." 16 U. S. C. § 668(a). The prohibition is "sweepingly framed"; the enumeration of forbidden acts is "exhaustive and careful." *Andrus* v. *Allard*, 444 U. S. 51, 56 (1979). The Act, however, authorizes the Secretary of the Interior to permit the taking, possession, and transportation of eagles "for the religious purposes of Indian tribes," and for certain other narrow purposes, upon a determination that such taking, possession, or transportation is compatible with the preservation of the bald eagle or the golden eagle. 16 U. S. C. § 668a.

Congressional intent to abrogate Indian treaty rights to hunt bald and golden eagles is certainly strongly suggested on the face of the Eagle Protection Act. The provision allowing taking of eagles under permit for the religious purposes of Indian tribes is difficult to explain except as a reflection of an understanding that the statute otherwise bans the taking of eagles by Indians, a recognition that such a prohibition would cause hardship for the Indians, and a decision that that problem should be solved not by exempting Indians from the coverage of the statute, but by authorizing the Secretary to issue permits to Indians where appropriate.

The legislative history of the statute supports that view. The Eagle Protection Act was originally passed in 1940, and did not contain any explicit reference to Indians. Its prohibitions related only to bald eagles; it cast no shadow on hunting of the more plentiful golden eagle. In 1962, however, Congress considered amendments to the Eagle Protection Act extending its ban to the golden eagle as well. As originally drafted by the staff of the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries, the amendments simply would have added the words "or any golden eagle" at two places in the Act where prohibitions relating to the bald eagle were described. Miscellaneous Fish and Wildlife Legislation: Hearings before the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries, 87th Cong., 2d Sess., 1 (1962) (hereinafter House Hearings).

Before the start of hearings on the bill, however, the Subcommittee received a letter from Assistant Secretary of the Interior Frank Briggs on behalf of the Interior Department. The Interior Department supported the proposed bill. It noted, however, the following concern:

> "The golden eagle is important in enabling many Indian tribes, particularly those in the Southwest, to continue ancient customs and ceremonies that are of deep religious or emotional significance to them. We note that the Handbook of American Indians (Smithsonian Institution, 1912) volume I, page 409, states in part, as follows:
>
> "'Among the many birds held in superstitious and appreciative regard by the aborigines of North America, the eagle, by reason of its majestic, solitary, and mysterious nature, became an especial object of worship. This is expressed in the employment of the eagle by the Indian for religious and esthetic purposes only.
>
> . . . . .
>
> "There are frequent reports of the continued veneration of eagles and of the use of eagle feathers in religious ceremonies of tribal rites. The Hopi, Zuni, and several of the Pueblo groups of Indians in the Southwest have

> great interest in and strong feelings concerning eagles. In the circumstances, it is evident that the Indians are deeply interested in the preservation of both the golden and the bald eagle. If enacted, the bill should therefore permit the Secretary of the Interior, by regulation, to allow the use of eagles for religious purposes by Indian tribes." House Hearings 2–3.

The House Committee reported out the bill.[7] In setting out the need for the legislation, it explained in part:

> "Certain feathers of the golden eagle are important in religious ceremonies of some Indian tribes and a large number of the birds are killed to obtain these feathers, as well as to provide souvenirs for tourists in the Indian country. In addition, they are actively hunted by bounty hunters in Texas and some other States. As a result of these activities if steps are not taken as contemplated in this legislation, there is grave danger that the golden eagle will completely disappear." H. R. Rep. No. 1450, 87th Cong., 2d Sess., 2 (1962).

The Committee also reprinted Assistant Secretary Briggs' letter in its Report, *id.*, at 3–5, and adopted an exception for Indian religious use drafted by the Interior Department. The bill as reported out of the House Committee thus made three major changes in the law, along with other more technical ones. It extended the law's ban to golden eagles. It provided that the Secretary may exempt, by permit, takings of bald or golden eagles "for the religious purposes of Indian tribes." And it added a final proviso: "Provided, That bald eagles may not be taken for any purpose unless, prior to such taking, a permit to do so is procured from the Secretary of the Interior." *Id.*, at 7. The bill, as amended, passed the

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[7] Various witnesses, during the course of the Subcommittee hearings, gave testimony relating to the effect of the proposed ban on Indian tribes. See House Hearings 15, 20, 29, 34, 35, 39, 47.

House and was reported to the Senate Committee on Commerce.

At the Senate hearings, representatives of the Interior Department reiterated their position that, because "the golden eagle is an important part of the ceremonies and religion of many Indian tribes," the Secretary should be authorized to allow the use of eagles for religious purposes by Indian tribes. Protection for the Golden Eagle: Hearings before a Subcommittee of the Senate Committee on Commerce, 87th Cong., 2d Sess., 23 (1962). The Senate Committee agreed, and passed the House bill with an additional amendment allowing the Secretary to authorize permits for the taking of golden eagles that were preying on livestock. That Committee again reprinted Assistant Secretary Briggs' letter, S. Rep. No. 1986, 87th Cong., 2d Sess., 5–7 (1962), and summarized the bill as follows: "The resolution as hereby reported would bring the golden eagle under the 1940 act, allow their taking under permit for the religious use of the various Indian tribes (their feathers are an important part of Indian religious rituals) and upon request of a Governor of any State, be taken for the protection of livestock and game." *Id.*, at 3–4. The bill passed the Senate, and was concurred in by the House, with little further discussion.

It seems plain to us, upon reading the legislative history as a whole, that Congress in 1962 believed that it was abrogating the rights of Indians to take eagles. Indeed, the House Report cited the demand for eagle feathers for Indian religious ceremonies as one of the threats to the continued survival of the golden eagle that necessitated passage of the bill. See *supra*, at 742. Congress expressly chose to set in place a regime in which the Secretary of the Interior had control over Indian hunting, rather than one in which Indian on-reservation hunting was unrestricted. Congress thus considered the special cultural and religious interests of Indians, balanced those needs against the conservation purposes of the statute, and provided a specific, narrow exception that delineated the extent to which Indians would be permitted to hunt the bald and golden eagle.

Respondent argues that the 1962 Congress did not in fact view the Eagle Protection Act as restricting Indian on-reservation hunting. He points to an internal Interior Department memorandum circulated in 1962 stating, with little analysis, that the Eagle Protection Act did not apply within Indian reservations. Memorandum from Assistant Solicitor Vaughn, Branch of Fish and Wildlife, Office of the Solicitor to the Director, Bureau of Sport Fisheries and Wildlife, Apr. 26, 1962. We have no reason to believe that Congress was aware of the contents of the Vaughn memorandum. More importantly, however, we find respondent's contention that the 1962 Congress did not understand the Act to ban all Indian hunting of eagles simply irreconcilable with the statute on its face.

Respondent argues, and the Eighth Circuit agreed, that the provision of the statute granting permit authority is not necessarily inconsistent with an intention that Indians would have unrestricted ability to hunt eagles while on reservations. Respondent construes that provision to allow the Secretary to issue permits to *non*-Indians to hunt eagles "for Indian religious purposes," and supports this interpretation by pointing out testimony during the hearings to the effect that large-scale eagle bounty hunters sometimes sold eagle feathers to Indian tribes. We do not find respondent's argument credible. Congress could have felt such a provision necessary only if it believed that Indians, if left free to hunt eagles on reservations, would nonetheless be unable to satisfy their own needs and would be forced to call on non-Indians to hunt on their behalf. Yet there is nothing in the legislative history that even remotely supports that patronizing and strained view. Indeed, the Interior Department immediately after the passage of the 1962 amendments adopted regulations authorizing permits *only* to "individual Indians who are authentic, bona fide practitioners of such religion." 28 Fed. Reg. 976 (1963).[8]

Congress' 1962 action, we conclude, reflected an unmistakable and explicit legislative policy choice that Indian hunting of the bald or golden eagle, except pursuant to permit, is inconsistent with the need to preserve those species. We therefore read the statute as having abrogated that treaty right.

B

Dion also asserts a treaty right to take bald eagles as a defense to his Endangered Species Act prosecution. He argues that the evidence that Congress intended to abrogate treaty rights when it passed the Endangered Species Act is considerably more slim than that relating to the Eagle Protection Act. The Endangered Species Act and its legislative history, he points out, are to a great extent silent regarding Indian hunting rights. In this case, however, we need not resolve the question of whether the Congress in the Endangered Species Act abrogated Indian treaty rights. We conclude that Dion's asserted treaty defense is barred in any event.

Dion asserts that he is immune from Endangered Species Act prosecution because he possesses a treaty right to hunt and kill bald eagles. We have held, however, that Congress in passing and amending the Eagle Protection Act divested Dion of his treaty right to hunt bald eagles. He therefore has no treaty right to hunt bald eagles that he can assert as a defense to an Endangered Species Act charge.

We do not hold that when Congress passed and amended the Eagle Protection Act, it stripped away Indian treaty protection for conduct not expressly prohibited by that statute.

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[8] Respondent's argument that Congress in amending the Eagle Protection Act meant to benefit nontreaty tribes is also flawed. Indian reservations created by statute, agreement, or executive order normally carry with them the same implicit hunting rights as those created by treaty. See Cohen 224; *Antoine* v. *Washington*, 420 U. S. 194 (1975).

But the Eagle Protection Act and the Endangered Species Act, in relevant part, prohibit exactly the same conduct, and for the same reasons. Dion here asserts a treaty right to engage in precisely the conduct that Congress, overriding Indian treaty rights, made criminal in the Eagle Protection Act. Dion's treaty shield for that conduct, we hold, was removed by that statute, and Congress' failure to discuss that shield in the context of the Endangered Species Act did not revive that treaty right.

It would not promote sensible law to hold that while Dion possesses no rights derived from the 1858 treaty that bar his prosecution under the Eagle Protection Act for killing bald eagles, he nonetheless possesses a right to hunt bald eagles, derived from that same treaty, that bars his Endangered Species Act prosecution for the same conduct. Even if Congress did not address Indian treaty rights in the Endangered Species Act sufficiently expressly to effect a valid abrogation, therefore, respondent can assert no treaty defense to a prosecution under that Act for a taking already explicitly prohibited under the Eagle Protection Act.

III

We hold that the Court of Appeals erred in recognizing Dion's treaty defense to his Eagle Protection Act and Endangered Species Act prosecutions. For the reasons stated in n. 3, *supra*, we do not pass on the claim raised by *amici* that the Eagle Protection Act, if read to abrogate Indian treaty rights, invades religious freedom. Cf. *United States* v. *Abeyta*, 632 F. Supp. 1301 (NM 1986). Nor do we address respondent's argument, raised for the first time in this Court, that the statutes under which he was convicted do not authorize separate convictions for taking and for selling the same birds. The judgment of the Court of Appeals is reversed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

THORNBURGH, GOVERNOR OF PENNSYLVANIA, ET AL. *v.* AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84-495. Argued November 5, 1985—Decided June 11, 1986

Appellees brought an action in Federal District Court alleging that the Pennsylvania Abortion Control Act of 1982 violated the Federal Constitution and seeking declaratory and injunctive relief. The court denied appellees' motion for a preliminary injunction, except as to one provision of the Act which it held was invalid. The Court of Appeals, after granting appellees' motion to enjoin enforcement of the entire Act, held unconstitutional, on the basis of the intervening decisions in *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, *Planned Parenthood Assn. of Kansas City, Mo., Inc.* v. *Ashcroft*, 462 U. S. 476, and *Simopoulos* v. *Virginia*, 462 U. S. 506, the following provisions of the Act: (1) the portions of § 3205 that, with respect to the requirement that the woman give her "informed consent" to an abortion, require her to be informed of the name of the physician who will perform the abortion, the "particular medical risks" of the abortion procedure to be used and of carrying her child to term, and the facts that there may be "detrimental physical and psychological effects," medical assistance benefits may be available for prenatal care, childbirth, and neonatal care, the father is liable to assist in the child's support, and printed materials are available from the State that describe the fetus and list agencies offering alternatives to abortion; (2) § 3208 that requires such printed materials to include a statement that there are agencies willing to help the mother carry her child to term and to assist her after the child is born and a description of the probable anatomical and physiological characteristics of an unborn child at "two-week gestational increments"; (3) §§ 3214(a) and (h) that require the physician to report, among other things, identification of the performing and referring physicians, information as to the woman's residence, age, race, marital status, and number of prior pregnancies, and the basis for any judgment that a medical emergency existed or for any determination of nonviability, and the method of payment for the abortion, and further provide that such reports shall not be deemed public records but shall be available for public inspection and copying in a form that will not lead to disclosure of the identity of any person filing a report; (4) § 3211(a) that requires the physician, after the first trimester, to report the basis for his determination that a child is not viable; (5) § 3210(b) that requires a physician performing a postviability abortion to exercise the degree of care required to preserve the life and health of any unborn child intended to be born and to use the abortion technique that would provide the best opportunity for the unborn child to be aborted alive unless it would present a significantly greater medical risk to the pregnant woman's life or health; and (6) § 3210(c) that requires that a second physician be present during an abortion performed when viability is possible, which physician is to take all reasonable steps necessary to preserve the child's life and health. The court held that the validity of other provisions of the Act might depend on evidence adduced at the trial and accordingly remanded these features of the case to the District Court.

Held:

1. In a situation such as is presented by this case, where the judgment below is not final and the case is remanded for further development of the facts, this Court has no appellate jurisdiction under 28 U. S. C. § 1254(2). But the jurisdictional statement here is treated as a petition for certiorari, and the writ is granted. Pp. 754–755.

2. With a full record before it on the issues as to the validity of the Act and with the intervening decisions in *Akron*, *Ashcroft*, and *Simopoulos* at hand, the Court of Appeals was justified in proceeding to plenary review of those issues. It was not limited to determining whether the District Court abused its discretion in denying a preliminary injunction. Pp. 755–757.

3. The States are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies. The provisions of the Pennsylvania Act that the Court of Appeals invalidated wholly subordinate constitutional privacy interests and concerns with maternal health to the effort to deter a woman from making a decision that, with her physician, is hers to make. Pp. 758–771.

(a) The printed materials required by §§ 3205 and 3208 are nothing less than an attempt to wedge the State's message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician. Similarly, § 3205's requirement that the woman be advised that medical assistance may be available and that the father is responsible for financial assistance in support of the child are poorly disguised elements of discouragement for the abortion decision. And § 3205's requirements that the physician inform the woman of "detrimental physical and psychological effects" and of all "particular medical risks" are the antithesis of informed consent. Pp. 759–765.

(b) The scope of the information required by §§ 3214(a) and (h) and 3211(a) and its availability to the public belie any assertions by the State that it is advancing any legitimate interest. The reporting requirements of those sections raise the specter of public exposure and harassment of women who choose to exercise their personal, intensely private, right, with their physician, to end a pregnancy. Thus, they pose an unacceptable danger of deterring the exercise of that right and must be invalidated. Pp. 765–768.

(c) Section 3210(b) is facially invalid as being unsusceptible to a construction that does not require the mother to bear an increased medical risk in order save her viable fetus. Section 3210(c), by failing to provide a medical-emergency exception for the situation where the mother's health is endangered by delay in the second physician's arrival, chills the performance of a late abortion, which, more than one performed at an earlier date, tends to be under emergency conditions. Pp. 768–771.

737 F. 2d 283, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, POWELL, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 772. BURGER, C. J., filed a dissenting opinion, *post*, p. 782. WHITE, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 785. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 814.

Andrew S. Gordon, Senior Deputy Attorney General of Pennsylvania, argued the cause for appellants. With him on the briefs were *LeRoy S. Zimmerman*, Attorney General, and *Allen C. Warshaw*, Chief Deputy Attorney General.

Kathryn Kolbert argued the cause for appellees. With her on the brief was *Thomas E. Zemaitis.**

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Acting Solicitor General Fried, Acting Assistant Attorney General Willard, Deputy Assistant Attorney General Kuhl, John F. Cordes*, and *John M. Rogers;* for the National Right to Life Committee, Inc., by *James Bopp, Jr.;* for the United States Catholic Conference by *Wilfred R. Caron* and *Mark E. Chopko;* for Senator Gordon J. Humphrey et al. by *Robert A. Destro* and *Basile J. Uddo;* for Watson D. Bowes, Jr., et al. by *Steven Frederick McDowell;* and for John D. Lane et al. by *John E. McKeever.*

Briefs of *amici curiae* urging affirmance were filed for the Attorney General of New York by *Robert Abrams*, Attorney General, *pro se*, *Robert Hermann*, Solicitor General, *Rosemarie Rhodes*, Assistant Attorney General, and *Lawrence S. Kahn, Sanford M. Cohen*, and *Martha J. Olson*, Assistant Attorneys General; for the American Civil Liberties Union et al. by *Nan D. Hunter, Janet Benshoof*, and *Suzanne M. Lynn;* for the American

JUSTICE BLACKMUN delivered the opinion of the Court.

This is an appeal from a judgment of the United States Court of Appeals for the Third Circuit reviewing the District Court's rulings upon a motion for a preliminary injunction. The Court of Appeals held unconstitutional several provisions of Pennsylvania's current Abortion Control Act, 1982 Pa. Laws, Act No. 138, now codified as 18 Pa. Cons. Stat. § 3201 *et seq.* (1982).[1] Among the provisions ruled invalid by the Court of Appeals were portions of § 3205, relating to "informed consent"; § 3208, concerning "printed information"; §§ 3210(b) and (c), having to do with postviability abortions; and § 3211(a) and §§ 3214(a) and (h), regarding reporting requirements.[2]

Medical Association et al. by *Benjamin W. Heineman, Jr., Carter G. Phillips, Newton N. Minow, Jack R. Bierig, Stephan E. Lawton, Joel I. Klein, Joseph A. Keyes, Jr.,* and *Ann E. Allen;* for the Center for Constitutional Rights et al. by *Anne E. Simon, Nadine Taub, Rhonda Copelon,* and *Judith Levin;* for the National Abortion Federation by *David I. Shapiro, Sidney Dickstein, Kenneth M. Simon,* and *Amy G. Applegate;* for the National Abortion Rights Action League et al. by *Lynn I. Miller;* for the National Family Planning and Reproductive Health Association, Inc., by *Robert T. Crothers;* for the National Organization for Women et al. by *Diane E. Thompson;* and for the Planned Parenthood Federation of America, Inc., et al. by *Dara Klassel* and *Eve W. Paul.*

Briefs of *amici curiae* were filed for the American Psychological Association by *Donald N. Bersoff* and *Bruce J. Ennis;* for the Women's Lawyers' Association of Los Angeles, California, et al. by *Susan R. Schwartz, Carol Boyk, Judith Gordon,* and *Lorraine Loder;* for the Unitarian Universalist Association et al. by *Madeline Kochen;* for Senator Bob Packwood et al. by *Laurence H. Tribe* and *Kathleen M. Sullivan;* for Susan Bandes et al. by *Arthur Kinoy;* and for Olivia Gans et al. by *James Bopp, Jr.*

[1] The District Court had held invalid and had enjoined preliminarily only the requirement of § 3205(a)(2) that at least 24 hours must elapse between a woman's receipt of specified information and the performance of her abortion. 552 F. Supp. 791, 797–798, 811 (ED Pa. 1982).

[2] The Court of Appeals also held § 3215(e) invalid. That section requires health-care insurers to make available, at a lesser premium, policies expressly excluding coverage "for abortion services not necessary to avert

I

The Abortion Control Act was approved by the Governor of the Commonwealth on June 11, 1982. By its own terms, however, see § 7 of the Act, it was to become effective only 180 days thereafter, that is, on the following December 8. It had been offered as an amendment to a pending bill to regulate paramilitary training.

The 1982 Act was not the Commonwealth's first attempt, after this Court's 1973 decisions in *Roe* v. *Wade*, 410 U. S. 113, and *Doe* v. *Bolton*, 410 U. S. 179, to impose abortion restraints. The State's first post-1973 Abortion Control Act, 1974 Pa. Laws, Act No. 209, was passed in 1974 over the Governor's veto. After extensive litigation, various provisions of the 1974 statute were ruled unconstitutional, including those relating to spousal or parental consent, to the choice of procedure for a postviability abortion, and to the proscription of abortion advertisements. See *Planned Parenthood Assn.* v. *Fitzpatrick*, 401 F. Supp. 554 (ED Pa. 1975), summarily aff'd in part *sub nom. Franklin* v. *Fitzgerald*, 428 U. S. 901 (1976), and summarily vacated in part and remanded *sub nom. Beal* v. *Franklin*, 428 U. S. 901 (1976), modified on remand (No. 74–2440) (ED Pa. 1977), aff'd *sub nom. Colautti* v. *Franklin*, 439 U. S. 379 (1979). See also *Doe* v. *Zimmerman*, 405 F. Supp. 534 (MD Pa. 1975).

In 1978, the Pennsylvania Legislature attempted to restrict access to abortion by limiting medical-assistance funding for the procedure. 2 1978 Pa. Laws, Act No. 16A (pp. 1506–1507) and 1 1978 Pa. Laws, Act No. 148. This effort, too, was successfully challenged in federal court, *Roe* v. *Casey*, 464 F. Supp. 487 (ED Pa. 1978), and that judgment was affirmed by the Third Circuit. 623 F. 2d 829 (1980).

In 1981, abortion legislation was proposed in the Pennsylvania House as an amendment to a pending Senate bill to out-

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the death of the woman or to terminate pregnancies caused by rape or incest." This ruling on § 3215(e) is not before us.

law "tough-guy competitions."[3] The suggested amendment, aimed at limiting abortions, was patterned after a model statute developed by a Chicago-based, nonprofit anti-abortion organization. See Note, Toward Constitutional Abortion Control Legislation: The Pennsylvania Approach, 87 Dick. L. Rev. 373, 382, n. 84 (1983). The bill underwent further change in the legislative process but, when passed, was vetoed by the Governor. See 737 F. 2d 283, 288–289 (CA3 1984). Finally, the 1982 Act was formulated, enacted, and approved.

After the passage of the Act, but before its effective date, the present litigation was instituted in the United States District Court for the Eastern District of Pennsylvania. The plaintiffs, who are the appellees here, were the American College of Obstetricians and Gynecologists, Pennsylvania Section; certain physicians licensed in Pennsylvania; clergymen; an individual who purchases from a Pennsylvania insurer health-care and disability insurance extending to abortions; and Pennsylvania abortion counselors and providers. Alleging that the Act violated the United States Constitution, the plaintiffs, pursuant to 42 U. S. C. § 1983, sought declaratory and injunctive relief. The defendants named in the complaint were the Governor of the Commonwealth, other Commonwealth officials, and the District Attorney for Montgomery County, Pa.

The plaintiffs promptly filed a motion for a preliminary injunction. Forty-one affidavits accompanied the motion. The defendants, on their part, submitted what the Court of Appeals described as "an equally comprehensive opposing memorandum." 737 F. 2d, at 289. The District Court then ordered the parties to submit a "stipulation of uncontested facts," as authorized by local rule. The parties produced a stipulation "solely for purposes of a determination on plaintiffs' motion for preliminary injunction," and "without prejudice to any party's right to controvert any facts or to prove any additional facts at any later proceeding in this action." App. 9a–10a.

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[3] A "tough-guy competition" is a physical contact bout between persons who lack professional experience and who attempt to render each other unconscious. See Note, 87 Dick. L. Rev. 373, 382, n. 84 (1983).

Relying substantially on the opinions of the respective Courts of Appeals in *Akron Center for Reproductive Health, Inc.* v. *City of Akron*, 651 F. 2d 1198 (CA6 1981), later aff'd in part and rev'd in part, 462 U. S. 416 (1983), and in *Planned Parenthood Assn. of Kansas City* v. *Ashcroft*, 655 F. 2d 848 (CA8 1981), later aff'd in part and rev'd in part, 462 U. S. 476 (1983), the District Court concluded that, with one exception, see n. 1, *supra*, the plaintiffs had failed to establish a likelihood of success on the merits and thus were not entitled to preliminary injunctive relief. 552 F. Supp. 791 (1982).

Appellees appealed from the denial of the preliminary injunction, and appellants cross-appealed with respect to the single statutory provision as to which the District Court had allowed relief. The Third Circuit then granted appellees' motion to enjoin enforcement of the entire Act pending appeal. After expedited briefing and argument, the court withheld judgment pending the anticipated decisions by this Court in *Akron*, *supra*, *Ashcroft*, *supra*, and *Simopoulos* v. *Commonwealth*, 221 Va. 1059, 277 S. E. 2d 194 (1981), all of which had been accepted for review here, had been argued, and were under submission. Those three cases were decided by this Court on June 15, 1983. See *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416; *Planned Parenthood Assn. of Kansas City, Missouri, Inc.* v. *Ashcroft*, 462 U. S. 476; *Simopoulos* v. *Virginia*, 462 U. S. 506. After reargument in light of those decisions, the Court of Appeals, with one judge concurring in part and dissenting in part, ruled that various provisions of the Act were unconstitutional. 737 F. 2d 283 (1984). Appellants' petition for rehearing en banc was denied, with four judges voting to grant the petition. *Id.*, at 316, 317. When a jurisdictional statement was filed here, we postponed further consideration of the question of our jurisdiction to the hearing on the merits. 471 U. S. 1014 (1985).

II

We are confronted initially with the question whether we have appellate jurisdiction in this case. Appellants purport to have taken their appeal to this Court pursuant to 28 U. S. C. § 1254(2).[4] It seems clear, and the parties appear to agree, see Brief for Appellants 21, that the judgment of the Court of Appeals was not a final judgment in the ordinary meaning of that term. The court did not hold the entire Act unconstitutional, but ruled, instead, that some provisions were invalid under *Akron*, *Ashcroft*, and *Simopoulos*, and that the validity of other provisions might depend on evidence adduced at the trial, see 737 F. 2d, at 299–300, or on procedural rules to be promulgated by the Supreme Court of Pennsylvania, see *id.*, at 296–297. It remanded these features of the case to the District Court. *Id.*, at 304.

Slaker v. *O'Connor*, 278 U. S. 188, 189–190 (1929), and *McLish* v. *Roff*, 141 U. S. 661, 665–666 (1891), surely suggest that, under these circumstances, we do not have appellate jurisdiction.[5] See also *South Carolina Electric & Gas Co.* v. *Flemming*, 351 U. S. 901 (1956). Although the authority of *Slaker* and *South Carolina Electric* has been questioned, the Court to date has found it unnecessary to put the issue to rest. See *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 927 (1975); *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 43–44, n. 1 (1986). In some cases raising this issue of the scope of appellate jurisdiction, the Court has found any finality requirement to have been satisfied in light of the facts. See, *e. g.*, *New Orleans* v. *Dukes*, 427 U. S. 297, 302 (1976); *Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U. S. 77, 82–83 (1958). In other cases, the Court has avoided the issue by utilizing 28 U. S. C. § 2103 and granting certiorari. See, *e. g.*, *Doran*, 422 U. S., at 927; *El Paso* v. *Simmons*, 379 U. S. 497, 503 (1965); see also *Escambia County* v. *McMillan*, 466 U. S. 48, 50, n. 4 (1984).

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[4] Section 1254 reads in pertinent part:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

. . . . .

"(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States . . . ."

[5] Appellants ask that *Slaker* be overruled. See Brief for Appellants 10, 22–25.

We have concluded that it is time that this undecided issue be resolved. We therefore hold, on the reasoning of *McLish* v. *Roff*, 141 U. S., at 665–668, that in a situation such as this one, where the judgment is not final, and where the case is remanded for further development of the facts, we have no appellate jurisdiction under § 1254(2).

We nevertheless treat appellants' jurisdictional statement as a petition for certiorari, grant the writ, and move on to the merits.[6]

III

Appellants assert that the Court of Appeals erred in holding portions of the Act unconstitutional since the scope of its review of the District Court's denial of a preliminary injunction as to those sections should have been limited to determining whether the trial court abused its discretion in finding the presence or absence of irreparable harm and a probability that the plaintiffs would succeed on the merits. Such limited review normally is appropriate, see *Doran* v. *Salem Inn, Inc.*, 422 U. S., at 931–932; *Brown* v. *Chote*, 411 U. S. 452, 456–457 (1973), inasmuch as the primary purpose of a preliminary injunction is to preserve the relative positions of the parties. See *University of Texas* v. *Camenisch*, 451 U. S. 390, 395 (1981). Further, the necessity for an expeditious resolution often means that the injunction is issued on a procedure less stringent than that which prevails at the subsequent trial on the merits of the application for injunctive relief. See *United States Steel Corp.* v. *Fraternal Assn. of Steelhaulers*, 431 F. 2d 1046, 1048 (CA3 1970); see also *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U. S. 310, 316 (1940).

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[6] We continue, however, to refer to the parties as appellants and appellees, respectively.

This approach, however, is not inflexible. The Court on more than one occasion in this area has approved proceedings deviating from the stated norm. In *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952), the District Court had issued a preliminary injunction restraining the Secretary of Commerce from seizing the Nation's steel mills. The Court of Appeals stayed the injunction. This Court found that the case was ripe for review, despite the early stage of the litigation, and went on to address the merits. *Id.*, at 585. And in *Smith* v. *Vulcan Iron Works*, 165 U. S. 518 (1897), the District Court issued injunctions in two patent cases and referred them to a Master for accounting. The Court of Appeals reversed. This Court ruled that the Court of Appeals had acted properly in deciding the merits since review of interlocutory appeals was designed not only to permit the defendant to obtain immediate relief but also in certain cases to save the parties the expense of further litigation. *Id.*, at 525.

The Third Circuit's decision to address the constitutionality of the Pennsylvania Act finds further support in this Court's decisions that when the unconstitutionality of the particular state action under challenge is clear, a federal court need not abstain from addressing the constitutional issue pending state-court review. See, *e. g.*, *Bailey* v. *Patterson*, 369 U. S. 31, 33 (1962); *Turner* v. *City of Memphis*, 369 U. S. 350, 353 (1962); *Zwickler* v. *Koota*, 389 U. S. 241, 251, n. 14 (1967). See also *Singleton* v. *Wulff*, 428 U. S. 106, 121 (1976). See generally Spann, Simple Justice, 73 Geo. L. J. 1041, 1055, n. 77 (1985).[7]

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[7] This principle finds an analogy in an established doctrine of administrative law. In *SEC* v. *Chenery Corp.*, 318 U. S. 80 (1943), the Court

Thus, as these cases indicate, if a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance, that ruling may be reviewed even though the appeal is from the entry of a preliminary injunction.[8] The Court of Appeals in this case properly recognized and applied these principles when it observed:

> "Thus, although this appeal arises from a ruling on a request for a preliminary injunction, we have before us an unusually complete factual and legal presentation from which to address the important constitutional issues at stake. The customary discretion accorded to a District Court's ruling on a preliminary injunction yields to our plenary scope of review as to the applicable law." 737 F. 2d, at 290.

That a court of appeals ordinarily will limit its review in a case of this kind to abuse of discretion is a rule of orderly judicial administration, not a limit on judicial power. With a full record before it on the issues now before us, and with the intervening decisions in *Akron*, *Ashcroft*, and *Simopoulos* at hand, the Court of Appeals was justified in proceeding to plenary review of those issues.

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ruled that a reviewing court could not affirm an agency on a principle the agency might not embrace. But the ruling in *Chenery* has not required courts to remand in futility. See *Illinois* v. *ICC*, 722 F. 2d 1341, 1348–1349 (CA7 1983); see also Friendly, *Chenery* Revisited: Reflections on Reversal and Remand of Administrative Orders, 1969 Duke L. J. 199.

[8] A different situation is presented, of course, when there is no disagreement as to the law, but the probability of success on the merits depends on facts that are likely to emerge at trial. See *Delaware & Hudson R. Co.* v. *United Transportation Union*, 146 U. S. App. D. C. 142, 159, 450 F. 2d 603, 620, cert. denied, 403 U. S. 911 (1971). See also *Airco, Inc.* v. *Energy Research & Development Admin.*, 528 F. 2d 1294, 1296 (CA7 1975); *California ex rel. Younger* v. *Tahoe Regional Planning Agency*, 516 F. 2d 215, 217 (CA9), cert. denied, 423 U. S. 868 (1975); *Natural Resources Defense Council, Inc.* v. *Morton*, 148 U. S. App. D. C. 5, 10, 458 F. 2d 827, 832 (1972); *Benda* v. *Grand Lodge*, 584 F. 2d 308, 314 (CA9 1978), cert. dism'd, 441 U. S. 937 (1979); *FTC* v. *Southwest Sunsites, Inc.*, 665 F. 2d 711, 717 (CA5), cert. denied, 456 U. S. 973 (1982).

IV

This case, as it comes to us, concerns the constitutionality of six provisions of the Pennsylvania Act that the Court of Appeals struck down as facially invalid: § 3205 ("informed consent"); § 3208 ("printed information"); §§ 3214(a) and (h) (reporting requirements); § 3211(a) (determination of viability); § 3210(b) (degree of care required in postviability abortions); and § 3210(c) (second-physician requirement). We have no reason to address the validity of the other sections of the Act challenged in the District Court.[9]

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[9] *Not* before us are: § 3203 (definition of "abortion"); § 3205 (24-hour waiting period and physician-only counseling); §§ 3207(b) and 3214(f) (public disclosure of reports); § 3209 (requirement of hospitalization for an abortion subsequent to the first trimester); § 3210(a) (penalties for abortion after viability, and the "complete defense" thereto); § 3215(c) (proscription of use of public funds for abortion services); and § 3215(e) (compulsory availability of insurance excluding certain abortion services).

Remanded for record development or otherwise not invalidated, and therefore not before us, are: § 3206 (parental consent—operation of statute enjoined until promulgation of rules by the Supreme Court of Pennsylvania assuring confidentiality and promptness of disposition); § 3207(b) (abortion facilities and reports from them for public disclosure); and §§ 3214(c), (d), (f), and (g) (other reporting requirements—challenges either not made or withdrawn).

On June 17, 1985, the District Court, after hearing, preliminarily enjoined the enforcement of §§ 3207(b) and 3214(f). 613 F. Supp. 656 (ED Pa.). See n. 12, *infra*.

The Supreme Court of Pennsylvania issued the suggested rules, mentioned above, on November 26, 1984, after the appeal in this case was docketed here. See Pennsylvania Orphans' Court Rules 16.1 to 16.8, reprinted in Pa. Stat. Ann., Tit. 20, pp. 65, 66 (Purdon Supp. to §§ 101–2507, 1986–1987). Appellants thereupon filed a motion with the District Court that the injunction against enforcement of § 3206 be vacated. App. 53a. That court, however, denied the motion, concluding that it had no jurisdiction "to issue the order [appellants] seek" while the case was on appeal here. *Id.*, at 57a, 61a. We decline appellants' suggestion that we now examine this feature of the case in the light of the new rules, for we conclude that this development should be considered by the District Court in the first instance.

A

Less than three years ago, this Court, in *Akron*, *Ashcroft*, and *Simopoulos*, reviewed challenges to state and municipal legislation regulating the performance of abortions. In *Akron*, the Court specifically reaffirmed *Roe* v. *Wade*, 410 U. S. 113 (1973). See 462 U. S., at 420, 426–431. Again today, we reaffirm the general principles laid down in *Roe* and in *Akron*.

In the years since this Court's decision in *Roe*, States and municipalities have adopted a number of measures seemingly designed to prevent a woman, with the advice of her physician, from exercising her freedom of choice. *Akron* is but one example. But the constitutional principles that led this Court to its decisions in 1973 still provide the compelling reason for recognizing the constitutional dimensions of a woman's right to decide whether to end her pregnancy. "[I]t should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." *Brown* v. *Board of Education*, 349 U. S. 294, 300 (1955). The States are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies. Appellants claim that the statutory provisions before us today further legitimate compelling interests of the Commonwealth. Close analysis of those provisions, however, shows that they wholly subordinate constitutional privacy interests and concerns with maternal health in an effort to deter a woman from making a decision that, with her physician, is hers to make.

B

We turn to the challenged statutes:

1. Section 3205 ("informed consent") and § 3208 ("printed information"). Section 3205(a) requires that the woman give her "voluntary and informed consent" to an abortion. Failure to observe the provisions of § 3205 subjects the physician to suspension or revocation of his license, and subjects any

other person obligated to provide information relating to informed consent to criminal penalties. § 3205(c). A requirement that the woman give what is truly a voluntary and informed consent, as a general proposition, is, of course, proper and is surely not unconstitutional. See *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52, 67 (1976). But the State may not require the delivery of information designed "to influence the woman's informed choice between abortion or childbirth." *Akron*, 462 U. S., at 443–444.

Appellants refer to the Akron ordinance, Brief for Appellants 67, as did this Court in *Akron* itself, 462 U. S., at 445, as "a litany of information" and as "'a parade of horribles'" of dubious validity plainly designed to influence the woman's choice. They would distinguish the Akron situation, however, from the Pennsylvania one. Appellants assert that statutes "describing the general subject matter relevant to informed consent," *ibid.*, and stating "in general terms the information to be disclosed," *id.*, at 447, are permissible, and they further assert that the Pennsylvania statutes do no more than that.

We do not agree. We conclude that, like Akron's ordinance, §§ 3205 and 3208 fail the *Akron* measurement. The two sections prescribe in detail the method for securing "informed consent." Seven explicit kinds of information must be delivered to the woman at least 24 hours before her consent is given, and five of these must be presented by the woman's physician. The five are: (a) the name of the physician who will perform the abortion, (b) the "fact that there may be detrimental physical and psychological effects which are not accurately foreseeable," (c) the "particular medical risks associated with the particular abortion procedure to be employed," (d) the probable gestational age, and (e) the "medical risks associated with carrying her child to term." The remaining two categories are (f) the "fact that medical assistance benefits may be available for prenatal care, childbirth and neonatal care," and (g) the "fact that the father is liable to assist" in the child's support, "even in instances where the father has offered to pay for the abortion." §§ 3205(a)(1) and (2). The woman also must be informed that materials printed and supplied by the Commonwealth that describe the fetus and that list agencies offering alternatives to abortion are available for her review. If she chooses to review the materials but is unable to read, the materials "shall be read to her," and any answer she seeks must be "provided her in her own language." § 3205(a)(2)(iii). She must certify in writing, prior to the abortion, that all this has been done. § 3205(a)(3). The printed materials "shall include the following statement":

> "'There are many public and private agencies willing and able to help you to carry your child to term, and to assist you and your child after your child is born, whether you choose to keep your child or place her or him for adoption. The Commonwealth of Pennsylvania strongly urges you to contact them before making a final decision about abortion. The law requires that your physician or his agent give you the opportunity to call agencies like these before you undergo an abortion.'" § 3208(a)(1).

The materials must describe the "probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from fertilization to full term, including any relevant information on the possibility of the unborn child's survival." § 3208(a)(2).

In *Akron*, this Court noted: "The validity of an informed consent requirement thus rests on the State's interest in protecting the health of the pregnant woman." 462 U. S., at 443. The Court went on to state:

> "This does not mean, however, that a State has unreviewable authority to decide what information a woman must be given before she chooses to have an

> abortion. It remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances. *Danforth*'s recognition of the State's interest in ensuring that this information be given will not justify abortion regulations designed to influence the woman's informed choice between abortion or childbirth." *Id.*, at 443–444.

The informational requirements in the *Akron* ordinance were invalid for two "equally decisive" reasons. *Id.*, at 445. The first was that "much of the information required is designed not to inform the woman's consent but rather to persuade her to withhold it altogether." *Id.*, at 444. The second was that a rigid requirement that a specific body of information be given in all cases, irrespective of the particular needs of the patient, intrudes upon the discretion of the pregnant woman's physician and thereby imposes the "undesired and uncomfortable straitjacket" with which the Court in *Danforth*, 428 U. S., at 67, n. 8, was concerned.

These two reasons apply with equal and controlling force to the specific and intrusive informational prescriptions of the Pennsylvania statutes. The printed materials required by §§ 3205 and 3208 seem to us to be nothing less than an outright attempt to wedge the Commonwealth's message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician. The mandated description of fetal characteristics at 2-week intervals, no matter how objective, is plainly overinclusive. This is not medical information that is always relevant to the woman's decision, and it may serve only to confuse and punish her and to heighten her anxiety, contrary to accepted medical practice.[10] Even the listing of agencies in the printed Pennsylvania form presents serious problems; it contains names of agencies that well may be out of step with the needs of the particular woman and thus places the physician in an awkward position and infringes upon his or her professional responsibilities. Forcing the physician or counselor to present the materials and the list to the woman makes him or her in effect an agent of the State in treating the woman and places his or her imprimatur upon both the materials and the list. See *Women's Medical Center of Providence, Inc.* v. *Roberts*, 530 F. Supp. 1136, 1154 (RI 1982). All this is, or comes close to being, state medicine imposed upon the woman, not the professional medical guidance she seeks, and it officially structures—as it obviously was intended to do—the dialogue between the woman and her physician.

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[10] Following this Court's lead in *Akron*, federal courts consistently have stricken fetal-description requirements because of their inflammatory impact. See, *e. g.*, *Planned Parenthood League of Massachusetts* v. *Bellotti*, 641 F. 2d 1006, 1021–1022 (CA1 1981); *Charles* v. *Carey*, 627 F. 2d

The requirements of §§ 3205(a)(2)(i) and (ii) that the woman be advised that medical assistance benefits may be available, and that the father is responsible for financial assistance in the support of the child similarly are poorly disguised elements of discouragement for the abortion decision. Much of this would be nonmedical information beyond the physician's area of expertise and, for many patients, would be irrelevant and inappropriate. For a patient with a life-threatening pregnancy, the "information" in its very rendition may be cruel as well as destructive of the physician-patient relationship. As any experienced social worker or other counselor knows, theoretical financial responsibility often does not equate with fulfillment. And a victim of rape should not have to hear gratuitous advice that an unidentified perpetrator is liable for support if she continues the pregnancy to term. Under the guise of informed consent, the Act requires the dissemination of information that is not relevant to such consent, and, thus, it advances no legitimate state interest.

772, 784 (CA7 1980); *Planned Parenthood Assn. of Kansas City* v. *Ashcroft*, 655 F. 2d 848, 868 (CA8 1981); *Women's Medical Center of Providence, Inc.* v. *Roberts*, 530 F. Supp. 1136, 1152–1154 (RI 1982).

The requirements of §§3205(a)(1)(ii) and (iii) that the woman be informed by the physician of "detrimental physical and psychological effects" and of all "particular medical risks" compound the problem of medical attendance, increase the patient's anxiety, and intrude upon the physician's exercise of proper professional judgment. This type of compelled information is the antithesis of informed consent. That the Commonwealth does not, and surely would not, compel similar disclosure of every possible peril of necessary surgery or of simple vaccination, reveals the anti-abortion character of the statute and its real purpose. Pennsylvania, like Akron, "has gone far beyond merely describing the general subject matter relevant to informed consent." *Akron*, 462 U. S., at 445. In addition, the Commonwealth would require the physician to recite its litany "regardless of whether in his judgment the information is relevant to [the patient's] personal decision." *Ibid.* These statutory defects cannot be saved by any facts that might be forthcoming at a subsequent hearing. Section 3205's informational requirements therefore are facially unconstitutional.[11]

Appellants assert, however, that even if this be so, the remedy is to allow the remainder of § 3205 to be severed and become effective. We rule otherwise. The radical dissection necessary for this would leave § 3205 with little resemblance to that intended by the Pennsylvania Legislature. We rejected a similar suggestion as to the ordinance in

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[11] In their argument against this conclusion, appellants claim that the informational requirements must be held constitutional in the light of this Court's summary affirmance in *Franklin* v. *Fitzpatrick*, 428 U. S. 901 (1976), of the judgment in *Planned Parenthood Assn.* v. *Fitzpatrick*, 401 F. Supp. 554 (ED Pa. 1975). That litigation concerned the Commonwealth's 1974 Abortion Control Act. Its informed-consent provision, however, did not contain such plainly unconstitutional informational requests as those in the current Act, or any physician-only counseling or 24-hour waiting-period requirements. The summary affirmance also preceded the decision in *Akron* and, to the extent, if any at all, it might be considered to be inconsistent with *Akron*, the latter, of course, controls.

Akron, 462 U.S, at 445, n. 37, despite the presence there of a broad severability clause. We reach the same conclusion here, where no such clause is present, and reject the plea for severance. See *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 312–313 (1936).

2. Sections 3214(a) and (h) (reporting) and § 3211(a) (determination of viability). Section 3214(a)(8), part of the general reporting section, incorporates § 3211(a). Section 3211(a) requires the physician to report the basis for his determination "that a child is not viable." It applies only after the first trimester. The report required by §§ 3214(a) and (h) is detailed and must include, among other things, identification of the performing and referring physicians and of the facility or agency; information as to the woman's political subdivision and State of residence, age, race, marital status, and number of prior pregnancies; the date of her last menstrual period and the probable gestational age; the basis for any judgment that a medical emergency existed; the basis for any determination of nonviability; and the method of payment for the abortion. The report is to be signed by the attending physician. § 3214(b).

Despite the fact that § 3214(e)(2) provides that such reports "shall not be deemed public records," within the meaning of the Commonwealth's "Right-to-Know Law," Pa. Stat. Ann., Tit. 65, § 66.1 *et seq.* (Purdon 1959 and Supp. 1985), each report "shall be made available for public inspection and copying within 15 days of receipt in a form which will not lead to the disclosure of the identity of any person filing a report." Similarly, the report of complications, required by § 3214(h), "shall be open to public inspection and copying." A willful failure to file a report required under § 3214 is "unprofessional conduct" and the noncomplying physician's license "shall be subject to suspension or revocation." § 3214(i)(1).

The scope of the information required and its availability to the public belie any assertions by the Commonwealth that it is advancing any legitimate interest. In *Planned Parent-*

hood of Central Missouri. v. *Danforth*, 428 U. S., at 80, we recognized that recordkeeping and reporting provisions "that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible." But the reports required under the Act before us today go well beyond the health-related interests that served to justify the Missouri reports under consideration in *Danforth*. Pennsylvania would require, as Missouri did not, information as to method of payment, as to the woman's personal history, and as to the bases for medical judgments. The Missouri reports were to be used "only for statistical purposes." See *id.*, at 87. They were to be maintained in confidence, with the sole exception of public health officers. In *Akron*, the Court explained its holding in *Danforth* when it said: "The decisive factor was that the State met its burden of demonstrating that these regulations furthered important health-related state concerns." 462 U. S., at 430.

The required Pennsylvania reports, on the other hand, while claimed not to be "public," are available nonetheless to the public for copying. Moreover, there is no limitation on the use to which the Commonwealth or the public copiers may put them. The elements that proved persuasive for the ruling in *Danforth* are absent here. The decision to terminate a pregnancy is an intensely private one that must be protected in a way that assures anonymity. JUSTICE STEVENS, in his opinion concurring in the judgment in *Bellotti* v. *Baird*, 443 U. S. 622 (1979), aptly observed:

> "It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties." *Id.*, at 655.

A woman and her physician will necessarily be more reluctant to choose an abortion if there exists a possibility that her decision and her identity will become known publicly. Although the statute does not specifically require the reporting of the woman's name, the amount of information about her and the circumstances under which she had an abortion are so detailed that identification is likely. Identification is the obvious purpose of these extreme reporting requirements.[12] The "impermissible limits" that *Danforth* mentioned and that Missouri approached, see 428 U. S., at 81, have been exceeded here.

We note, as we reach this conclusion, that the Court consistently has refused to allow government to chill the exercise of constitutional rights by requiring disclosure of protected, but sometimes unpopular, activities. See, *e. g.*, *Lamont* v. *Postmaster General*, 381 U. S. 301 (1965) (invalidating Post Office requirement that addressee affirmatively request delivery of "communist" materials in order to receive them); *Talley* v. *California*, 362 U. S. 60, 64–65 (1960) (striking down municipal ban on unsigned handbills); *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 462–465 (1958) (invalidating compelled disclosure of NAACP membership list). Pennsylvania's reporting requirements raise the specter of public exposure and harassment of women who choose to exercise their personal, intensely private, right, with their physician, to end a pregnancy. Thus, they pose an unacceptable danger of deterring the exercise of that right, and must be invalidated.

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[12] Appellees advise us, see Brief for Appellees 38–39, that they sought in the District Court a preliminary injunction against the requirement that the facility identification report and the quarterly statistical report be made available for public inspection and copying, and that on June 17, 1985, after full hearing, the District Court entered a preliminary injunction against the enforcement of these public-disclosure requirements. Appellees assert that the record of that hearing shows a continuous pattern of violence and harassment directed against the patients and staff of abortion clinics; that the District Court concluded that this would be increased by the public disclosure of facility names and quarterly statistical reports; and that public disclosure would impose a burden on the woman's right to an abortion by heightening her fear and anxiety, and by discouraging her physician from offering an abortion because, by so doing, he would avoid pressure from anti-abortion forces. That record, of course, is not now before us. We need place no reliance upon it and we draw no conclusion from it.

3. Section 3210(b) (degree of care for postviability abortions) and § 3210(c) (second-physician requirement when the fetus is possibly viable). Section 3210(b)[13] sets forth two independent requirements for a postviability abortion. First, it demands the exercise of that degree of care "which such person would be required to exercise in order to preserve the life and health of any unborn child intended to be born and not aborted." Second, "the abortion technique employed shall be that which would provide the best opportunity for the unborn child to be aborted alive unless," in the physician's good-faith judgment, that technique "would present a significantly greater medical risk to the life or health of the pregnant woman." An intentional, knowing, or reckless violation of this standard is a felony of the third degree, and subjects the violator to the possibility of imprisonment for not more than seven years and to a fine of not more than $15,000. See 18 Pa. Cons. Stat. §§ 1101(2) and 1103(3) (1982).

The Court of Appeals ruled that § 3210(b) was unconstitutional because it required a "trade-off" between the woman's health and fetal survival, and failed to require that maternal health be the physician's paramount consideration. 737 F. 2d, at 300, citing *Colautti* v. *Franklin*, 439 U. S. 379, 397–401 (1979) (where Pennsylvania's 1974 Abortion Control Act was reviewed). In *Colautti*, this Court recognized the undesirability of any "'trade-off' between the woman's health and additional percentage points of fetal survival." *Id.*, at 400.

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[13] Section 3210(b) reads:

"Every person who performs or induces an abortion after an unborn child has been determined to be viable shall exercise that degree of professional skill, care and diligence which such person would be required to exercise in order to preserve the life and health of any unborn child intended to be born and not aborted and the abortion technique employed shall be that which would provide the best opportunity for the unborn child to be aborted alive unless, in the good faith judgment of the physician, that method or technique would present a significantly greater medical risk to the life or health of the pregnant woman than would another available method or technique and the physician reports the basis for his judgment. The potential psychological or emotional impact on the mother of the unborn child's survival shall not be deemed a medical risk to the mother. Any person who intentionally, knowingly or recklessly violates the provisions of this subsection commits a felony of the third degree."

Appellants do not take any real issue with this proposition. See Brief for Appellants 84–86. They argue instead, as did the District Court, see 552 F. Supp., at 806–807, that the statute's words "significantly greater medical risk" for the life or health of the woman do not mean some additional risk (in which case unconstitutionality apparently is conceded) but only a "meaningfully increased" risk. That interpretation, said the District Court, renders the statute constitutional. *Id.*, at 807. The Court of Appeals disagreed, pointing out that such a reading is inconsistent with the statutory language and with the legislative intent reflected in that language; that the adverb "significantly" modifies the risk imposed on the woman; that the adverb is "patently not surplusage"; and that the language of the statute "is not susceptible to a construction that does not require the mother to bear an increased medical risk in order to save her viable fetus." 737 F. 2d, at 300. We agree with the Court of Appeals and therefore find the statute to be facially invalid.[14]

Section 3210(c)[15] requires that a second physician be present during an abortion performed when viability is possi-

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[14] This makes it unnecessary for us to consider appellees' further argument that § 3210(b) is void for vagueness.

[15] Section 3210(c) reads:

"Any person who intends to perform an abortion the method chosen for which, in his good faith judgment, does not preclude the possibility of the child surviving the abortion, shall arrange for the attendance, in the same room in which the abortion is to be completed, of a second physician. Immediately after the complete expulsion or extraction of the child, the second physician shall take control of the child and shall provide immediate medical care for the child, taking all reasonable steps necessary, in his ble. The second physician is to "take control of the child and . . . provide immediate medical care for the child, taking all reasonable steps necessary, in his judgment, to preserve the child's life and health." Violation of this requirement is a felony of the third degree.

In *Planned Parenthood Assn. of Kansas City, Missouri, Inc.* v. *Ashcroft*, 462 U. S. 476 (1983), the Court, by a 5–4 vote, but not by a controlling single opinion, ruled that a Missouri statute requiring the presence of a second physician during an abortion performed after viability was constitutional. JUSTICE POWELL, joined by THE CHIEF JUSTICE, concluded that the State had a compelling interest in protecting the life of a viable fetus and that the second physician's presence provided assurance that the State's interest was protected more fully than with only one physician in attendance. *Id.*, at 482–486.[16] JUSTICE POWELL recognized that, to pass constitutional muster, the statute must contain an exception for the situation where the health of the mother was endangered by delay in the arrival of the second physician. Recognizing that there was "no clearly expressed exception" on the face of the Missouri statute for the emergency situation, JUSTICE POWELL found the exception implicit in the statutory requirement that action be taken to preserve the fetus "provided it does not pose an increased risk to the life or health of the woman." *Id.*, at 485, n. 8.

Like the Missouri statute, § 3210(c) of the Pennsylvania statute contains no express exception for an emergency situation. While the Missouri statute, in the view of JUSTICE POWELL, was worded sufficiently to imply an emergency exception, Pennsylvania's statute contains no such comforting or

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judgment, to preserve the child's life and health. Any person who intentionally, knowingly or recklessly violates the provisions of this subsection commits a felony of the third degree."

[16] JUSTICE O'CONNOR, joined by JUSTICES WHITE and REHNQUIST, stated somewhat categorically that the second-physician requirement was constitutional. 462 U. S., at 505.

helpful language and evinces no intent to protect a woman whose life may be at risk. Section 3210(a)[17] provides only a defense to criminal liability for a physician who concluded, in good faith, that a fetus was nonviable "or that the abortion was necessary to preserve maternal life or health." It does not relate to the second-physician requirement and its words are not words of emergency.

It is clear that the Pennsylvania Legislature knows how to provide a medical-emergency exception when it chooses to do so. It defined "[m]edical emergency" in general terms in § 3203, and it specifically provided a medical-emergency exception with respect to informational requirements, § 3205(b); for parental consent, § 3206; for post-first-trimester hospitalization, § 3209; and for a public official's issuance of an order for an abortion without the express voluntary consent of the woman, § 3215(f). We necessarily conclude that the legislature's failure to provide a medical-emergency exception in § 3210(c) was intentional. All the factors are here for chilling the performance of a late abortion, which, more than one performed at an earlier date, perhaps tends to be under emergency conditions.

V

Constitutional rights do not always have easily ascertainable boundaries, and controversy over the meaning of our Nation's most majestic guarantees frequently has been turbulent. As judges, however, we are sworn to uphold the law even when its content gives rise to bitter dispute. See *Cooper* v. *Aaron*, 358 U. S. 1 (1958). We recognized at the very beginning of our opinion in *Roe*, 410 U. S., at 116, that abortion raises moral and spiritual questions over which honorable persons can disagree sincerely and profoundly. But those disagreements did not then and do not now relieve us of our duty to apply the Constitution faithfully.

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[17] Section 3210(a) reads:

"Any person who intentionally, knowingly or recklessly performs or induces an abortion when the fetus is viable commits a felony of the third degree. It shall be a complete defense to any charge brought against a physician for violating the requirements of this section that he had concluded in good faith, in his best medical judgment, that the unborn child was not viable at the time the abortion was performed or induced or that the abortion was necessary to preserve maternal life or health."

Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government. See, *e. g.*, *Carey* v. *Population Services International*, 431 U. S. 678 (1977); *Moore* v. *East Cleveland*, 431 U. S. 494 (1977); *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972); *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *Meyer* v. *Nebraska*, 262 U. S. 390 (1923). See also *Whalen* v. *Roe*, 429 U. S. 589, 598–600 (1977). That promise extends to women as well as to men. Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision—with the guidance of her physician and within the limits specified in *Roe*—whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.

The Court of Appeals correctly invalidated the specified provisions of Pennsylvania's 1982 Abortion Control Act. Its judgment is affirmed.

It is so ordered.

JUSTICE STEVENS, concurring.

The scope of the individual interest in liberty that is given protection by the Due Process Clause of the Fourteenth Amendment is a matter about which conscientious judges have long disagreed. Although I believe that that interest is significantly broader than JUSTICE WHITE does,[1] I have always had the highest respect for his views on this subject.[2] In this case, although our ultimate conclusions differ, it may be useful to emphasize some of our areas of agreement in order to ensure that the clarity of certain fundamental propositions not be obscured by his forceful rhetoric.

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[1] Compare, *e. g.*, his opinion for the Court in *Meachum* v. *Fano*, 427 U. S. 215 (1976), with my dissent in that case, *id.*, at 229.

Let me begin with a reference to *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), the case holding that a State may not totally forbid the use of birth control devices. Although the Court's opinion relied on a "right of marital privacy" within the "penumbra" of the Bill of Rights, *id.*, at 481–486, JUSTICE WHITE's concurring opinion went right to the heart of the issue. He wrote:

> "It would be unduly repetitious, and belaboring the obvious, to expound on the impact of this statute on the liberty guaranteed by the Fourteenth Amendment against arbitrary or capricious denials or on the nature of this liberty. Suffice it to say that this is not the first time this Court has had occasion to articulate that the liberty entitled to protection under the Fourteenth Amendment includes the right 'to marry, establish a home and bring up children,' *Meyer* v. *Nebraska*, 262 U. S. 390, 399, and 'the liberty . . . to direct the upbringing and education of children,' *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534–535, and that these are among 'the basic civil rights of man.' *Skinner* v. *Oklahoma*, 316 U. S. 535, 541. These decisions affirm that there is a 'realm of family life which the state cannot enter' without substantial justification. *Prince* v. *Massachusetts*, 321 U. S. 158, 166. Surely the right invoked in this case, to be free of regulation of the intimacies of the marriage relationship, 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrange-

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[2] See, *e. g.*, Stevens, Judicial Restraint, 22 San Diego L. Rev. 437, 449–450 (1985).

> ments.' *Kovacs* v. *Cooper*, 336 U. S. 77, 95 (opinion of Frankfurter, J.)." *Id.*, at 502–503 (WHITE, J., concurring in the judgment).

He concluded that the statute could not be constitutionally applied to married persons, explaining:

> "I find nothing in this record justifying the sweeping scope of this statute, with its telling effect on the freedoms of married persons, and therefore conclude that it deprives such persons of liberty without due process of law." *Id.*, at 507.

That conclusion relied in part on the fact that the statute involved "sensitive areas of liberty"[3] and in part on the absence of any colorable justification for applying the statute to married couples.

In *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972), JUSTICE WHITE concluded that a similar Massachusetts statute was invalid as applied to a person whom the record did not identify as either married or unmarried, *id.*, at 464–465, and in *Carey* v. *Population Services International*, 431 U. S. 678 (1977), he subscribed to this explanation of the holdings in *Griswold* and *Eisenstadt:*

> "The fatal fallacy in [the appellants'] argument is that it overlooks the underlying premise of those decisions that the Constitution protects 'the right of the individual

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[3] "The nature of the right invaded is pertinent, to be sure, for statutes regulating sensitive areas of liberty do, under the cases of this Court, require 'strict scrutiny,' *Skinner* v. *Oklahoma*, 316 U. S. 535, 541, and 'must be viewed in the light of less drastic means for achieving the same basic purpose.' *Shelton* v. *Tucker*, 364 U. S. 479, 488. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.' *Bates* v. *Little Rock*, 361 U. S. 516, 524. See also *McLaughlin* v. *Florida*, 379 U. S. 184. But such statutes, if reasonably necessary for the effectuation of a legitimate and substantial state interest, and not arbitrary or capricious in application, are not invalid under the Due Process Clause. *Zemel* v. *Rusk*, 381 U. S. 1." 381 U. S., at 503–504.

> . . . to be free from unwarranted governmental intrusion into . . . the decision whether to bear or beget a child.' [*Eisenstadt* v. *Baird*, 405 U. S.] at 453. *Griswold* did state that by 'forbidding the *use* of contraceptives rather than regulating their manufacture or sale,' the Connecticut statute there had 'a maximum destructive impact' on privacy rights. 381 U. S., at 485. This intrusion into 'the sacred precincts of marital bedrooms' made that statute particularly 'repulsive.' *Id.*, at 485–486. But subsequent decisions have made clear that the constitutional protection of individual autonomy in matters of childbearing is not dependent on that element. *Eisenstadt* v. *Baird*, holding that the protection is not limited to married couples, characterized the protected right as the '*decision* whether to bear or beget a child.' 405 U. S., at 453 (emphasis added). Similarly, *Roe* v. *Wade*, held that the Constitution protects 'a woman's *decision* whether or not to terminate her pregnancy.' 410 U. S., at 153 (emphasis added). See also *Whalen* v. *Roe*, [429 U. S. 589,] 599–600, and n. 26. These decisions put *Griswold* in proper perspective. *Griswold* may no longer be read as holding only that a State may not prohibit a married couple's use of contraceptives. Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State." 431 U. S., at 687; *id.*, at 702 (WHITE, J., concurring in pertinent part and concurring in result).

Thus, the aspect of liberty at stake in this case is the freedom from unwarranted governmental intrusion into individual decisions in matters of childbearing. As JUSTICE WHITE explained in *Griswold*, that aspect of liberty comes to this Court with a momentum for respect that is lacking when appeal is made to liberties which derive merely from shifting economic arrangements.

Like the birth control statutes involved in *Griswold* and *Baird*, the abortion statutes involved in *Roe* v. *Wade*, 410 U. S. 113 (1973), and in the case before us today apply equally to decisions made by married persons and by unmarried persons. Consistently with his views in those cases, JUSTICE WHITE agrees that "a woman's ability to choose an abortion is a species of 'liberty' that is subject to the general protections of the Due Process Clause." *Post*, at 790. His agreement with that "indisputable" proposition, *ibid.*, is not qualified or limited to decisions made by pregnant women who are married and, indeed, it would be a strange form of liberty if it were so limited.

Up to this point in JUSTICE WHITE's analysis, his opinion is fully consistent with the accepted teachings of the Court and with the major premises of *Roe* v. *Wade*. For reasons that are not entirely clear, however, JUSTICE WHITE abruptly announces that the interest in "liberty" that is implicated by a decision not to bear a child that is made a few days after conception is *less* fundamental than a comparable decision made before conception. *Post*, at 791–792. There may, of course, be a significant difference in the strength of the countervailing state interest, but I fail to see how a decision on childbearing becomes *less* important the day after conception than the day before. Indeed, if one decision is more "fundamental" to the individual's freedom than the other, surely it is the postconception decision that is the more serious. Thus, it is difficult for me to understand how JUSTICE WHITE reaches the conclusion that restraints upon this aspect of a woman's liberty do not "call into play anything more than the most minimal judicial scrutiny." *Post*, at 790.[4]

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[4] At times JUSTICE WHITE's rhetoric conflicts with his own analysis. For instance, his emphasis on the lack of a decision by "the people . . . in 1787, 1791, 1868, or any time since," *post*, at 797, stands in sharp contrast to his earlier, forthright rejection of "the simplistic view that constitutional interpretation can possibly be limited to 'the plain meaning' of the Constitution's text or to the subjective intention of the Framers." *Post*, at 789. Similarly, his statement that an abortion decision should be sub-

If JUSTICE WHITE were correct in regarding the post-conception decision of the question whether to bear a child as a relatively unimportant, second-class sort of interest, I might agree with his view that the individual should be required to conform her decision to the will of the majority. But if that decision commands the respect that is traditionally associated with the "sensitive areas of liberty" protected by the Constitution, as JUSTICE WHITE characterized reproductive decisions in *Griswold*, 381 U. S., at 503, no individual should be compelled to surrender the freedom to make that decision for herself simply because her "value preferences" are not shared by the majority.[5] In a sense, the basic question is whether the "abortion decision" should be made by the individual or by the majority "in the unrestrained im-

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ject to "the will of the people," *post*, at 796, does not take us very far in determining *which* people—the majorities in state legislatures or the individuals confronted with unwanted pregnancies. In view of his agreement that the decision about abortion is "a species of liberty" protected by the Constitution, moreover, *post*, at 790, and in view of the fact that "liberty" plays a rather prominent role in our Constitution, his suggestion that the Court's evaluation of that interest represents the imposition of "extraconstitutional value preferences," *post*, at 794, seems to me inexplicable. This characterization of the Court's analysis as "extraconstitutional" also does not reflect JUSTICE WHITE's simultaneous recognition that "[t]he Constitution . . . is a document announcing fundamental principles in value-laden terms that leave ample scope for the exercise of normative judgment by those charged with interpreting and applying it." *Post*, at 789. Finally, I fail to see how the fact that "men and women of good will and high commitment to constitutional government," *post*, at 793, are on both sides of the abortion issue helps to resolve the difficult constitutional question before us; I take it that the disputants in most constitutional controversies in our free society can be similarly characterized.

[5] "What a person is, what he wants, the determination of his life plan, of his concept of the good, are the most intimate expressions of self-determination, and by asserting a person's responsibility for the results of this self-determination we give substance to the concept of liberty." C. Fried, Right and Wrong, 146–147 (1978).

See also Fried, Correspondence, 6 Phil. & Pub. Aff. 288–289 (1977) (the concept of privacy embodies the "moral fact that a person belongs to himself and not others nor to society as a whole").

position of its own, extraconstitutional value preferences." *Post*, at 794. But surely JUSTICE WHITE is quite wrong in suggesting that the Court is imposing value preferences on anyone else. *Ibid.*[6]

JUSTICE WHITE is also surely wrong in suggesting that the governmental interest in protecting fetal life is equally compelling during the entire period from the moment of conception until the moment of birth. *Post*, at 795. Again, I recognize that a powerful theological argument can be made for that position, but I believe our jurisdiction is limited to the evaluation of secular state interests.[7] I should think it obvious that the State's interest in the protection of an embryo—even if that interest is defined as "protecting those who will be citizens," *ibid.*—increases progressively and dramatically as the organism's capacity to feel pain, to experience pleasure, to survive, and to react to its surroundings increases day by day. The development of a fetus—and pregnancy itself—are not static conditions, and the assertion that the government's interest is static simply ignores this reality.

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[6] JUSTICE WHITE's characterization of the governmental interest as "protecting those who will be citizens if their lives are not ended in the womb," *post*, at 795, reveals that his opinion may be influenced as much by his own value preferences as by his view about the proper allocation of decisionmaking responsibilities between the individual and the State. For if federal judges must allow the State to make the abortion decision, presumably the State is free to decide that a woman may *never* abort, may *sometimes* abort, or, as in the People's Republic of China, must *always* abort if her family is already too large. In contrast, our cases represent a consistent view that the individual is primarily responsible for reproductive decisions, whether the State seeks to prohibit reproduction, *Skinner* v. *Oklahoma*, 316 U. S. 535 (1942), or to require it, *Roe* v. *Wade*, 410 U. S. 113 (1973).

[7] The responsibility for nurturing the soul of the newly born, as well as the unborn, rests with individual parents, not with the State. No matter how important a sacrament such as baptism may be, a State surely could not punish a mother for refusing to baptize her child.

Nor is it an answer to argue that life itself is not a static condition, and that "there is no nonarbitrary line separating a fetus from a child, or indeed, an adult human being," *post*, at 792. For, unless the religious view that a fetus is a "person" is adopted—a view JUSTICE WHITE refuses to embrace, *ibid.*—there is a fundamental and well-recognized difference between a fetus and a human being; indeed, if there is not such a difference, the permissibility of terminating the life of a fetus could scarcely be left to the will of the state legislatures.[8] And if distinctions may be drawn between a fetus and a human being in terms of the state interest in their protection—even though the fetus represents one of "those who will be citizens"—it seems to me quite odd to argue that distinctions may not also be drawn between the state interest in protecting the freshly fertilized egg and the state interest in protecting the 9-month-gestated, fully sentient fetus on the eve of birth. Recognition of this distinction is supported not only by logic, but also by history[9] and by our shared experiences.

Turning to JUSTICE WHITE's comments on *stare decisis*, he is of course correct in pointing out that the Court "has not hesitated to overrule decisions, or even whole lines of cases, where experience, scholarship, and reflection demonstrated that their fundamental premises were not to be found in the Constitution." *Post*, at 787. But JUSTICE WHITE has not disavowed the "fundamental premises" on which the decision in *Roe* v. *Wade* rests. He has not disavowed the Court's prior approach to the interpretation of the word "liberty" or, more narrowly, the line of cases that culminated in the unequivocal holding, applied to unmarried persons and married persons alike, "that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State." *Carey*, 431 U. S., at 687; *id.*, at 702 (WHITE, J., concurring in pertinent part).[10]

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[8] No Member of this Court has ever suggested that a fetus is a "person" within the meaning of the Fourteenth Amendment.

[9] See *Roe* v. *Wade*, *supra*, at 129–147.

Nor does the fact that the doctrine of *stare decisis* is not an absolute bar to the reexamination of past interpretations of the Constitution mean that the values underlying that doctrine may be summarily put to one side. There is a strong public interest in stability, and in the orderly conduct of our affairs, that is served by a consistent course of constitutional adjudication. Acceptance of the fundamental premises that underlie the decision in *Roe* v. *Wade*, as well as the application of those premises in that case, places the primary responsibility for decision in matters of childbearing squarely in the private sector of our society.[11] The majority remains free to preach the evils of birth control and abortion and to persuade others to make correct decisions while the individual faced with the reality of a difficult choice having serious and personal consequences of major importance to her own future—perhaps to the salvation of her own immortal soul—remains free to seek and to obtain sympathetic guidance from those who share her own value preferences.

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[10] He has, however, suggested that the concept of "liberty" is limited by two basic "definitions" of the values at stake. *Post*, at 790–791. Like JUSTICE WHITE, I share Justice Harlan's concern about "judges . . . roaming at large in the constitutional field." *Ibid.;* see also Stevens, 22 San Diego L. Rev., at 449–450. But I am convinced that JUSTICE WHITE's use of "definitions" is an inadequate substitute for the difficult process of analysis and judgment that the guarantee of liberty requires, a process nowhere better expressed than by Justice Harlan:

"Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.

. . . . .

"Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed. Though we exercise limited and sharply restrained judgment, yet there is no 'mechanical yardstick,' no 'mechanical answer.' The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision must take 'its place in relation to what went before and further [cut] a channel for what is to come.' *Irvine* v. *California*, 347 U. S. 128, 147 (dissenting opinion)." *Poe* v. *Ullman*, 367 U. S. 497, 542–544 (1961) (Harlan, J., dissenting).

In the final analysis, the holding in *Roe* v. *Wade* presumes that it is far better to permit some individuals to make incorrect decisions than to deny all individuals the right to make decisions that have a profound effect upon their destiny. Arguably a very primitive society would have been protected from evil by a rule against eating apples; a majority familiar with Adam's experience might favor such a rule. But the lawmakers who placed a special premium on the protection of individual liberty have recognized that certain values are more important than the will of a transient majority.[12]

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[11] "These cases do not deal with the individual's interest in protection from unwarranted public attention, comment, or exploitation. They deal, rather, with the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny. The Court has referred to such decisions as implicating 'basic values,' as being 'fundamental,' and as being dignified by history and tradition. The character of the Court's language in these cases brings to mind the origins of the American heritage of freedom—the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable. Guided by history, our tradition of respect for the dignity of individual choice in matters of conscience and the restraints implicit in the federal system, federal judges have accepted the responsibility for recognition and protection of these rights in appropriate cases." *Fitzgerald* v. *Porter Memorial Hospital*, 523 F. 2d 716, 719–720 (CA7 1975) (footnotes omitted), cert. denied, 425 U. S. 916 (1976).

CHIEF JUSTICE BURGER, dissenting.

I agree with much of JUSTICE WHITE's and JUSTICE O'CONNOR's dissents. In my concurrence in the companion case to *Roe* v. *Wade*, 410 U. S. 113, in 1973, I noted:

> "I do not read the Court's holdings today as having the sweeping consequences attributed to them by the dissenting Justices; the dissenting views discount the reality that the vast majority of physicians observe the standards of their profession, and act only on the basis of carefully deliberated medical judgments relating to life and health. Plainly, the Court today rejects any claim that the Constitution requires abortions on demand." *Doe* v. *Bolton*, 410 U. S. 179, 208 (1973).

Later, in *Maher* v. *Roe*, 432 U. S. 464, 481 (1977), I stated my view that

> "[t]he Court's holdings in *Roe* . . . and *Doe* v. *Bolton* . . . simply require that a State not create an absolute barrier to a woman's decision to have an abortion."

I based my concurring statements in *Roe* and *Maher* on the principle expressed in the Court's opinion in *Roe* that the right to an abortion "is not unqualified and must be considered against important state interests in regulation." 410 U. S., at 154–155. In short, every Member of the *Roe* Court rejected the idea of abortion on demand. The Court's opinion today, however, plainly undermines that important principle, and I regretfully conclude that some of the concerns of the dissenting Justices in *Roe*, as well as the concerns I expressed in my separate opinion, have now been realized.

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[12] "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 638 (1943).

The extent to which the Court has departed from the limitations expressed in *Roe* is readily apparent. In *Roe*, the Court emphasized

> "that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman . . . ." *Id.*, at 162.

Yet today the Court astonishingly goes so far as to say that the State may not even require that a woman contemplating an abortion be provided with accurate medical information concerning the risks inherent in the medical procedure which she is about to undergo and the availability of state-funded alternatives if she elects not to run those risks. Can anyone doubt that the State could impose a similar requirement with respect to other medical procedures? Can anyone doubt that doctors routinely give similar information concerning risks in countless procedures having far less impact on life and health, both physical and emotional than an abortion, and risk a malpractice lawsuit if they fail to do so?

Yet the Court concludes that the State cannot impose this simple information-dispensing requirement in the abortion context where the decision is fraught with serious physical, psychological, and moral concerns of the highest order. Can it possibly be that the Court is saying that the Constitution *forbids* the communication of such critical information to a woman?* We have apparently already passed the point at

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*The Court's astounding rationale for this holding is that such information might have the effect of "discouraging abortion," *ante*, at 762, as though abortion is something to be advocated and encouraged. This is at odds not only with *Roe* but with our subsequent abortion decisions as well. As I stated in my opinion for the Court in *H. L.* v. *Matheson*, 450 U. S. 398 (1981), upholding a Utah statute requiring that a doctor notify the parents of a minor seeking an abortion: "The Constitution does not compel a state which abortion is available merely on demand. If the statute at issue here is to be invalidated, the "demand" will not even have to be the result of an informed choice.

The Court in *Roe* further recognized that the State "has still *another* important and legitimate interest" which is "separate and distinct" from the interest in protecting maternal health, *i. e.*, an interest in "protecting the potentiality of human life." *Ibid.* The point at which these interests become "compelling" under *Roe* is at viability of the fetus. *Id.*, at 163. Today, however, the Court abandons that standard and renders the solemnly stated concerns of the 1973 *Roe* opinion for the interests of the states mere shallow rhetoric. The statute at issue in this case requires that a second physician be present during an abortion performed after viability, so that the second physician can "take control of the child and . . . provide immediate medical care . . . taking all reasonable steps necessary, in his judgment, to preserve the child's life and health." 18 Pa. Cons. Stat. §3210(c) (1982).

Essentially this provision simply states that a viable fetus is to be cared for, not destroyed. No governmental power exists to say that a viable fetus should not have every protection required to preserve its life. Undoubtedly the Pennsylvania Legislature added the second-physician requirement on the mistaken assumption that this Court meant what it said in *Roe* concerning the "compelling interest" of the states in potential life after viability.

The Court's opinion today is but the most recent indication of the distance traveled since *Roe*. Perhaps the first important road marker was the Court's holding in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52 (1976), in which the Court held (over the dissent of JUSTICE WHITE

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to fine-tune its statutes so as to encourage or faciliate abortions. To the contrary, state action 'encouraging childbirth except in the most urgent circumstances' is 'rationally related to the legitimate governmental objective of protecting potential life.'" *Id.*, at 413 (quoting *Harris* v. *McRae*, 448 U. S. 297, 325 (1980)).

joined by JUSTICE REHNQUIST and myself) that the State may not require that minors seeking an abortion first obtain parental consent. Parents, not judges or social workers, have the inherent right and responsibility to advise their children in matters of this sensitivity and consequence. Can one imagine a surgeon performing an amputation or even an appendectomy on a 14-year-old girl without the consent of a parent or guardian except in an emergency situation?

Yet today the Court goes beyond *Danforth* by remanding for further consideration of the provisions of Pennsylvania's statute requiring that a minor seeking an abortion without parental consent petition the appropriate court for authorization. Even if I were to agree that the Constitution requires that the states may not provide that a minor receive parental consent before undergoing an abortion, I would certainly hold that judicial approval may be required. This is in keeping with the longstanding common-law principle that courts may function *in loco parentis* when parents are unavailable or neglectful, even though courts are not very satisfactory substitutes when the issue is whether a 12-, 14-, or 16-year-old unmarried girl should have an abortion. In my view, no remand is necessary on this point because the statutory provision in question is constitutional.

In discovering constitutional infirmities in state regulations of abortion that are in accord with our history and tradition, we may have lured judges into "roaming at large in the constitutional field." *Griswold* v. *Connecticut*, 381 U. S. 479, 502 (1965) (Harlan, J., concurring). The soundness of our holdings must be tested by the decisions that purport to follow them. If *Danforth* and today's holding really mean what they seem to say, I agree we should reexamine *Roe*.

JUSTICE WHITE, with whom JUSTICE REHNQUIST joins, dissenting.

Today the Court carries forward the "difficult and continuing venture in substantive due process," *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52 (1976)

(WHITE, J., dissenting), that began with the decision in *Roe* v. *Wade*, 410 U. S. 113 (1973), and has led the Court further and further afield in the 13 years since that decision was handed down. I was in dissent in *Roe* v. *Wade* and am in dissent today. In Part I below, I state why I continue to believe that this venture has been fundamentally misguided since its inception. In Part II, I submit that even accepting *Roe* v. *Wade*, the concerns underlying that decision by no means command or justify the results reached today. Indeed, in my view, our precedents in this area, applied in a manner consistent with sound principles of constitutional adjudication, require reversal of the Court of Appeals on the ground that the provisions before us are facially constitutional.[1]

I

The rule of *stare decisis* is essential if case-by-case judicial decisionmaking is to be reconciled with the principle of the rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results. But *stare decisis* is not the only constraint upon judicial decisionmaking. Cases—like this one—that involve our assumed power to set aside on grounds of unconstitutionality a state or federal statute representing the democratically expressed will of the people call other considerations into play. Because the Constitution itself is ordained and established by the people of the United States, constitutional adjudication by this Court does not, in theory at any rate, frustrate the authority of the people to govern themselves through institutions of their own devising and in accordance with principles of their own choosing. But decisions that find in the Constitution principles or values that cannot fairly be read into that document usurp the people's authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation. For this reason, it is essential that this Court maintain the power to restore authority to its proper possessors by correcting constitutional decisions that, on reconsideration, are found to be mistaken.

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[1] I shall, for the most part, leave to one side the Court's somewhat extraordinary procedural rulings. I do not strongly disagree with the Court's decision to read a finality requirement into 28 U. S. C. § 1254(2), although I would have thought it incumbent on the Court to explain why the Court of Appeals' judgment as to the statutory provisions before us today, which represents a definitive ruling on their constitutionality, is not sufficiently "final" to satisfy the jurisdictional statute as interpreted by the Court.

As for the Court's ruling that it is permissible for an appellate court to resolve an appeal from the grant or the denial of a preliminary injunction by issuing a final judgment as to the constitutionality of a statute, I do not disagree that this may, in rare cases, be an appropriate course of action where the constitutional issues are clear. I would stress that this is by no means the preferred course of action in the run of cases, and I assume that the majority's opinion is not to the contrary. I do disagree quite strongly with the majority's application of this principle here, as I believe, contrary to the majority, that it is quite evident that the statute before us is constitutional on its face. I also believe, as will become evident, that at least one of the Court's rulings is exceedingly inappropriate in view of the preliminary posture of this case even if the majority's legal premises are accepted.

The Court has therefore adhered to the rule that *stare decisis* is not rigidly applied in cases involving constitutional issues, see *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 543 (1962) (opinion of Harlan, J.), and has not hesitated to overrule decisions, or even whole lines of cases, where experience, scholarship, and reflection demonstrated that their fundamental premises were not to be found in the Constitution. *Stare decisis* did not stand in the way of the Justices who, in the late 1930's, swept away constitutional doctrines that had placed unwarranted restrictions on the power of the State and Federal Governments to enact social and economic legislation, see *United States* v. *Darby*, 312 U. S. 100 (1941); *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 (1937). Nor did *stare decisis* deter a different set of Justices, some 15 years later, from rejecting the theretofore prevailing view that the Fourteenth Amendment permitted the States to maintain the system of racial segregation. *Brown* v. *Board of Education*, 347 U. S. 483 (1954). In both instances, history has been far kinder to those who departed from precedent than to those who would have blindly followed the rule of *stare decisis*. And only last Term, the author of today's majority opinion reminded us once again that "when it has become apparent that a prior decision has departed from a proper understanding" of the Constitution, that decision must be overruled. *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 557 (1985).

In my view, the time has come to recognize that *Roe* v. *Wade*, no less than the cases overruled by the Court in the decisions I have just cited, "departs from a proper understanding" of the Constitution and to overrule it. I do not claim that the arguments in support of this proposition are new ones or that they were not considered by the Court in *Roe* or in the cases that succeeded it. Cf. *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 419–420 (1983). But if an argument that a constitutional decision is erroneous must be novel in order to justify overruling that precedent, the Court's decisions in *Lochner* v. *New York*, 198 U. S. 45 (1905), and *Plessy* v. *Ferguson*, 163 U. S. 537 (1896), would remain the law, for the doctrines announced in those decisions were nowhere more eloquently or incisively criticized than in the dissenting opinions of Justices Holmes (in *Lochner*) and Harlan (in both cases). That the flaws in an opinion were evident at the time it was handed down is hardly a reason for adhering to it.

A

Roe v. *Wade* posits that a woman has a fundamental right to terminate her pregnancy, and that this right may be restricted only in the service of two compelling state interests: the interest in maternal health (which becomes compelling only at the stage in pregnancy at which an abortion becomes more hazardous than carrying the pregnancy to term) and the interest in protecting the life of the fetus (which becomes compelling only at the point of viability). A reader of the Constitution might be surprised to find that it encompassed these detailed rules, for the text obviously contains no references to abortion, nor, indeed, to pregnancy or reproduction generally; and, of course, it is highly doubtful that the authors of any of the provisions of the Constitution believed that they were giving protection to abortion. As its prior cases clearly show, however, this Court does not subscribe to the simplistic view that constitutional interpretation can possibly be limited to the "plain meaning" of the Constitution's text or to the subjective intention of the Framers. The Constitution is not a deed setting forth the precise metes and bounds of its subject matter; rather, it is a document announcing fundamental principles in value-laden terms that leave ample scope for the exercise of normative judgment by those charged with interpreting and applying it. In particular, the Due Process Clause of the Fourteenth Amendment, which forbids the deprivation of "life, liberty, or property without due process of law," has been read by the majority of the Court to be broad enough to provide substantive protection against state infringement of a broad range of individual interests. See *Moore* v. *East Cleveland*, 431 U. S. 494, 541–552 (1977) (WHITE, J., dissenting).

In most instances, the substantive protection afforded the liberty or property of an individual by the Fourteenth Amendment is extremely limited: State action impinging on individual interests need only be rational to survive scrutiny under the Due Process Clause, and the determination of rationality is to be made with a heavy dose of deference to the policy choices of the legislature. Only "fundamental" rights are entitled to the added protection provided by strict judicial scrutiny of legislation that impinges upon them. See *id.*, at 499 (opinion of POWELL, J.); *id.*, at 537 (Stewart, J., joined by

REHNQUIST, J., dissenting); *id.*, at 547–549 (WHITE, J., dissenting). I can certainly agree with the proposition—which I deem indisputable—that a woman's ability to choose an abortion is a species of "liberty" that is subject to the general protections of the Due Process Clause. I cannot agree, however, that this liberty is so "fundamental" that restrictions upon it call into play anything more than the most minimal judicial scrutiny.

Fundamental liberties and interests are most clearly present when the Constitution provides specific textual recognition of their existence and importance. Thus, the Court is on relatively firm ground when it deems certain of the liberties set forth in the Bill of Rights to be fundamental and therefore finds them incorporated in the Fourteenth Amendment's guarantee that no State may deprive any person of liberty without due process of law. When the Court ventures further and defines as "fundamental" liberties that are nowhere mentioned in the Constitution (or that are present only in the so-called "penumbras" of specifically enumerated rights), it must, of necessity, act with more caution, lest it open itself to the accusation that, in the name of identifying constitutional principles to which the people have consented in framing their Constitution, the Court has done nothing more than impose its own controversial choices of value upon the people.

Attempts to articulate the constraints that must operate upon the Court when it employs the Due Process Clause to protect liberties not specifically enumerated in the text of the Constitution have produced varying definitions of "fundamental liberties." One approach has been to limit the class of fundamental liberties to those interests that are "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if [they] were sacrificed." *Palko* v. *Connecticut*, 302 U. S. 319, 325, 326 (1937); see *Moore* v. *East Cleveland*, 431 U. S., at 537 (Stewart, J., joined by REHNQUIST, J., dissenting). Another, broader approach is to define fundamental liberties as those that are "deeply rooted in this Nation's history and tradition." *Id.*, at 503 (opinion of POWELL, J.); see also *Griswold* v. *Connecticut*, 381 U. S. 479, 501 (1965) (Harlan, J., concurring). These distillations of the possible approaches to the identification of unenumerated fundamental rights are not and do not purport to be precise legal tests or "mechanical yardstick[s]," *Poe* v. *Ullman*, 367 U. S. 497, 544 (1961) (Harlan, J., dissenting). Their utility lies in their effort to identify some source of constitutional value that reflects not the philosophical predilections of individual judges, but basic choices made by the people themselves in constituting their system of government—*"the balance struck by this country,"* *id.*, at 542 (emphasis added)—and they seek to achieve this end through locating fundamental rights either in the traditions and consensus of our society as a whole or in the logical implications of a system that recognizes both individual liberty and democratic order. Whether either of these approaches can, as Justice Harlan hoped, prevent "judges from roaming at large in the constitutional field," *Griswold*, *supra*, at 502, is debatable. What for me is not subject to debate, however, is that either of the basic definitions of fundamental liberties, taken seriously, indicates the illegitimacy of the Court's decision in *Roe* v. *Wade*.

The Court has justified the recognition of a woman's fundamental right to terminate her pregnancy by invoking decisions upholding claims of personal autonomy in connection with the conduct of family life, the rearing of children, marital privacy, the use of contraceptives, and the preservation of the individual's capacity to procreate. See *Carey* v. *Population Services International*, 431 U. S. 678 (1977); *Moore* v. *East Cleveland*, *supra; Eisenstadt* v. *Baird*, 405 U. S. 438 (1972); *Griswold* v. *Connecticut*, *supra; Skinner* v. *Oklahoma*, 316 U. S. 535 (1942); *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *Meyer* v. *Nebraska*, 262 U. S. 390 (1923). Even if each of these cases was correctly decided and could be properly grounded in rights that are "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition," the issues in the cases cited differ from those at stake where abortion is concerned. As the Court appropriately recognized in *Roe* v. *Wade*, "[t]he pregnant woman cannot be isolated in her privacy," 410 U. S., at 159; the termination of a pregnancy typically involves the destruction of another entity: the fetus. However one answers the metaphysical or theological question whether the fetus is a "human being" or the legal question whether it is a "person" as that term is used in the Constitution, one must at least recognize, first, that the fetus is an entity that bears in its cells all the genetic information that characterizes a member of the species *homo sapiens* and distinguishes an individual member of that species from all others, and second, that there is no nonarbitrary line separating a fetus from a child or, indeed, an adult human being. Given that the continued existence and development—that is to say, the *life*—of such an entity are so directly at stake in the woman's decision whether or not to terminate her pregnancy, that decision must be recognized as *sui generis*, different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy.[2] Accordingly, the decisions cited by the Court both in *Roe* and in its opinion today as precedent for the fundamental nature of the liberty to choose abortion do not, even if all are accepted as valid, dictate the Court's classification.

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[2] That the abortion decision, like the decisions protected in *Griswold*, *Eisenstadt*, and *Carey*, concerns childbearing (or, more generally, family life) in no sense necessitates a holding that the liberty to choose abortion is "fundamental." That the decision involves the destruction of the fetus renders it different in kind from the decision not to conceive in the first place. This difference does not go merely to the weight of the state interest in regulating abortion; it affects as well the characterization of the liberty interest itself. For if the liberty to make certain decisions with respect to contraception without governmental constraint is "fundamental," it is not only because those decisions are "serious" and "important" to the individual, see *ante*, at 776 (STEVENS, J., concurring), but also because some value of privacy or individual autonomy that is somehow implicit in the scheme of ordered liberties established by the Constitution supports a judgment that such decisions are none of government's business. The

If the woman's liberty to choose an abortion is fundamental, then, it is not because any of our precedents (aside from *Roe* itself) command or justify that result; it can only be because protection for this unique choice is itself "implicit in the concept of ordered liberty" or, perhaps, "deeply rooted in this Nation's history and tradition." It seems clear to me that it is neither. The Court's opinion in *Roe* itself convincingly refutes the notion that the abortion liberty is deeply rooted in the history or tradition of our people, as does the continuing and deep division of the people themselves over the question of abortion. As for the notion that choice in the matter of abortion is implicit in the concept of ordered liberty, it seems apparent to me that a free, egalitarian, and democratic society does not presuppose any particular rule or set of rules with respect to abortion. And again, the fact that many men and women of good will and high commitment to constitutional government place themselves on both sides of the abortion controversy strengthens my own conviction that the values animating the Constitution do not compel rec-

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same cannot be said where, as here, the individual is not "isolated in her privacy."

My point can be illustrated by drawing on a related area in which fundamental liberty interests have been found: childrearing. The Court's decisions in *Moore* v. *East Cleveland*, *Pierce* v. *Society of Sisters*, and *Meyer* v. *Nebraska* can be read for the proposition that parents have a fundamental liberty to make decisions with respect to the upbringing of their children. But no one would suggest that this fundamental liberty extends to assaults committed upon children by their parents. It is not the case that parents have a fundamental liberty to engage in such activities and that the State may intrude to prevent them only because it has a compelling interest in the well-being of children; rather, such activities, by their very nature, should be viewed as outside the scope of the fundamental liberty interest.

ognition of the abortion liberty as fundamental. In so denominating that liberty, the Court engages not in constitutional interpretation, but in the unrestrained imposition of its own, extraconstitutional value preferences.[3]

B

A second, equally basic error infects the Court's decision in *Roe* v. *Wade*. The detailed set of rules governing state restrictions on abortion that the Court first articulated in *Roe* and has since refined and elaborated presupposes not only that the woman's liberty to choose an abortion is fundamental, but also that the State's countervailing interest in protecting fetal life (or, as the Court would have it, "potential human life," 410 U. S., at 159) becomes "compelling" only at the point at which the fetus is viable. As JUSTICE O'CONNOR pointed out three years ago in her dissent in *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S., at 461, the Court's choice of viability as the point at which the State's interest becomes compelling is entirely arbitrary. The Court's "explanation" for the line it has drawn is that the State's interest becomes compelling at viability "because the fetus then presumably has the capacity of meaningful life outside the mother's womb." 410 U. S., at 163. As one critic of *Roe* has observed, this argument "mistakes a definition for a syllogism." Ely, The Wages of Crying Wolf: A Comment on *Roe v. Wade*, 82 Yale L. J. 920, 924 (1973).

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[3] JUSTICE STEVENS asserts, *ante*, at 778, that I am "quite wrong in suggesting that the Court is imposing value preferences on anyone else" when it denominates the liberty to choose abortion as "fundamental" (in contradistinction to such other, nonfundamental liberties as the liberty to use dangerous drugs or to operate a business without governmental interference) and thereby disempowers state electoral majorities from legislating in this area. I can only respond that I cannot conceive of a definition of the phrase "imposing value preferences" that does not encompass the Court's action.

JUSTICE STEVENS also suggests that it is the legislative majority that has engaged in "the unrestrained imposition of its own, extraconstitutional value preferences" when a state legislature restricts the availability of abortion. *Ibid.* But a legislature, unlike a court, has the inherent power to do so unless its choices are constitutionally *forbidden*, which, in my view, is not the case here.

The governmental interest at issue is in protecting those who will be citizens if their lives are not ended in the womb. The substantiality of this interest is in no way dependent on the probability that the fetus may be capable of surviving outside the womb at any given point in its development, as the possibility of fetal survival is contingent on the state of medical practice and technology, factors that are in essence morally and constitutionally irrelevant. The State's interest is in the fetus as an entity in itself, and the character of this entity does not change at the point of viability under conventional medical wisdom. Accordingly, the State's interest, if compelling after viability, is equally compelling before viability.[4]

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[4] Contrary to JUSTICE STEVENS' suggestion, *ibid.*, this is no more a "theological" position than is the Court's own judgment that viability is the point at which the state interest becomes compelling. (Interestingly, JUSTICE STEVENS omits any real effort to defend this judgment.) The point is that the specific interest the Court has recognized as compelling after the point of viability—that is, the interest in protecting "potential human life"—is present as well before viability, and the point of viability seems to bear no discernible relationship to the strength of that interest. Thus, there is no basis for concluding that the essential character of the state interest becomes transformed at the point of viability.

Further, it is self-evident that neither the legislative decision to assert a state interest in fetal life before viability nor the judicial decision to recognize that interest as compelling constitutes an impermissible "religious" decision merely because it coincides with the belief of one or more religions. Certainly the fact that the prohibition of murder coincides with one of the Ten Commandments does not render a State's interest in its murder statutes less than compelling, nor are legislative and judicial decisions concerning the use of the death penalty tainted by their correspondence to varying religious views on that subject. The simple, and perhaps unfortunate, fact of the matter is that in determining whether to assert an interest in fetal life, a State cannot avoid taking a position that will correspond to some religious beliefs and contradict others. The same is true to some extent with respect to the choice this Court faces in characterizing an asserted state

C

Both the characterization of the abortion liberty as fundamental and the denigration of the State's interest in preserving the lives of nonviable fetuses are essential to the detailed set of constitutional rules devised by the Court to limit the States' power to regulate abortion. If either or both of these facets of *Roe* v. *Wade* were rejected, a broad range of limitations on abortion (including outright prohibition) that are now unavailable to the States would again become constitutional possibilities.

In my view, such a state of affairs would be highly desirable from the standpoint of the Constitution. Abortion is a hotly contested moral and political issue. Such issues, in our society, are to be resolved by the will of the people, either as expressed through legislation or through the general principles they have already incorporated into the Constitution they have adopted.[5] *Roe* v. *Wade* implies that the people

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interest in fetal life, for denying that such an interest is a "compelling" one necessarily entails a negative resolution of the "religious" issue of the humanity of the fetus, whereas accepting the State's interest as compelling reflects at least tolerance for a state decision that is congruent with the equally "religious" position that human life begins at conception. Faced with such a decision, the most appropriate course of action for the Court is to defer to a legislative resolution of the issue: in other words, if a state legislature asserts an interest in protecting fetal life, I can see no satisfactory basis for *denying* that it is compelling.

[5] JUSTICE STEVENS, see *ante*, at 776–777, n. 4, finds a contradiction between my recognition that constitutional analysis requires more than mere textual analysis or a search for the specific intent of the Framers, *supra*, at 789, and my assertion that it is ultimately the will of the people that is the source of whatever values are incorporated in the Constitution. The fallacy of JUSTICE STEVENS' argument is glaring. The rejection of what has been characterized as "clause-bound" interpretivism, J. Ely, Democracy and Distrust 12 (1980), does not necessarily carry with it a rejection of the notion that constitutional adjudication is a search for values and principles that are implicit (and explicit) in the structure of rights and institutions that the people have themselves created. The implications of those values for the resolution of particular issues will in many if not most cases not have been explicitly considered when the values themselves were

have already resolved the debate by weaving into the Constitution the values and principles that answer the issue. As I have argued, I believe it is clear that the people have never—not in 1787, 1791, 1868, or at any time since—done any such thing. I would return the issue to the people by overruling *Roe* v. *Wade*.

II

As it has evolved in the decisions of this Court, the freedom recognized by the Court in *Roe* v. *Wade* and its progeny is essentially a negative one, based not on the notion that abortion is a good in itself, but only on the view that the legitimate goals that may be served by state coercion of private choices regarding abortion are, at least under some circumstances, outweighed by the damage to individual autonomy and privacy that such coercion entails. In other words, the evil of abortion does not justify the evil of forbidding it. Cf. *Stanley* v. *Georgia*, 394 U. S. 557 (1969). But precisely because *Roe* v. *Wade* is not premised on the notion that abortion is itself desirable (either as a matter of constitutional entitlement or of social policy), the decision does not command the States to fund or encourage abortion, or even to approve

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chosen—indeed, there will be some cases in which those who framed the provisions incorporating certain principles into the Constitution will be found to have been incorrect in their assessment of the consequences of their decision. See, *e. g.*, *Brown* v. *Board of Education*, 347 U. S. 483 (1954). Nonetheless, the hallmark of a correct decision of constitutional law is that it rests on principles selected by the people through their Constitution, and not merely on the personal philosophies, be they libertarian or authoritarian, of the judges of the majority. While constitutional adjudication involves judgments of value, it remains the case that some values are indeed "extraconstitutional," in that they have no roots in the Constitution that the people have chosen. The Court's decision in *Lochner* v. *New York*, 198 U. S. 45 (1905), was wrong because it rested on the Court's belief that the liberty to engage in a trade or occupation without governmental regulation was somehow fundamental—an assessment of value that was unsupported by the Constitution. I believe that *Roe* v. *Wade*—and today's decision as well—rests on similarly extraconstitutional assessments of the value of the liberty to choose an abortion.

of it. Rather, we have recognized that the States may legitimately adopt a policy of encouraging normal childbirth rather than abortion so long as the measures through which that policy is implemented do not amount to direct compulsion of the woman's choice regarding abortion. *Harris* v. *McRae*, 448 U. S. 297 (1980); *Maher* v. *Roe*, 432 U. S. 464 (1977); *Beal* v. *Doe*, 432 U. S. 438 (1977). The provisions before the Court today quite obviously represent the State's effort to implement such a policy.

The majority's opinion evinces no deference toward the State's legitimate policy. Rather, the majority makes it clear from the outset that it simply disapproves of any attempt by Pennsylvania to legislate in this area. The history of the state legislature's decade-long effort to pass a constitutional abortion statute is recounted as if it were evidence of some sinister conspiracy. See *ante*, at 751–752. In fact, of course, the legislature's past failure to predict the evolution of the right first recognized in *Roe* v. *Wade* is understandable and is in itself no ground for condemnation. Moreover, the legislature's willingness to pursue permissible policies through means that go to the limits allowed by existing precedents is no sign of *mens rea*. The majority, however, seems to find it necessary to respond by changing the rules to invalidate what before would have seemed permissible. The result is a decision that finds no justification in the Court's previous holdings, departs from sound principles of constitutional and statutory interpretation, and unduly limits the State's power to implement the legitimate (and in some circumstances compelling) policy of encouraging normal childbirth in preference to abortion.

A

The Court begins by striking down statutory provisions designed to ensure that the woman's choice of an abortion is fully informed—that is, that she is aware not only of the reasons for having an abortion, but also of the risks associated with an abortion and the availability of assistance that might make the alternative of normal childbirth more attractive than it might otherwise appear. At first blush, the Court's action seems extraordinary: after all, *Roe* v. *Wade* purports to be about freedom of choice, and statutory provisions requiring that a woman seeking an abortion be afforded information regarding her decision not only do not limit her ability to choose abortion, but also would appear to enhance her freedom of choice by helping to ensure that her decision whether or not to terminate her pregnancy is an informed one. Indeed, maximization of the patient's freedom of choice—not restriction of his or her liberty—is generally perceived to be the principal value justifying the imposition of disclosure requirements upon physicians:

> "The root premise is the concept, fundamental in American jurisprudence, that '[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body. . . .' True consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each. The average patient has little or no understanding of the medical arts, and ordinarily has only his physician to whom he can look for enlightenment with which to reach an intelligent decision. From these almost axiomatic considerations springs the need, and in turn the requirement, of a reasonable divulgence by physician to patient to make such a decision possible." *Canterbury* v. *Spence*, 150 U. S. App. D. C. 263, 271, 464 F. 2d 772, 780 (1972).

One searches the majority's opinion in vain for a convincing reason why the apparently laudable policy of promoting informed consent becomes unconstitutional when the subject is abortion. The majority purports to find support in *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416 (1983). But *Akron* is not controlling. The informed-consent provisions struck down in that case, as characterized by the majority, required the physician to advance tendentious statements concerning the unanswerable question of when human life begins, to offer merely speculative descriptions of the anatomical features of the fetus carried by the woman seeking the abortion, and to recite a "parade of horribles" suggesting that abortion is "a particularly dangerous procedure." *Id.*, at 444–445. I have no quarrel with the general proposition, for which I read *Akron* to stand, that a campaign of state-promulgated disinformation cannot be justified in the name of "informed consent" or "freedom of choice." But the Pennsylvania statute before us cannot be accused of sharing the flaws of the ordinance at issue in *Akron*. As the majority concedes, the statute does not, on its face, require that the patient be given any information that is false or unverifiable. Moreover, it is unquestionable that all of the information required would be relevant in many cases to a woman's decision whether or not to obtain an abortion.

Why, then, is the statute unconstitutional? The majority's argument, while primarily rhetorical, appears to offer three answers. First, the information that must be provided will in some cases be irrelevant to the woman's decision. This is true. Its pertinence to the question of the statute's constitutionality, however, is beyond me. Legislators are ordinarily entitled to proceed on the basis of rational generalizations about the subject matter of legislation, and the existence of particular cases in which a feature of a statute performs no function (or is even counterproductive) ordinarily does not render the statute unconstitutional or even constitutionally suspect. Only where the statute is subject to heightened scrutiny by virtue of its impingement on some fundamental right or its employment of a suspect classification does the imprecision of the "fit" between the statute's ends and means become potentially damning. Here, there is nothing to trigger such scrutiny, for the statute does not directly infringe the allegedly fundamental right at issue—the woman's right to choose an abortion. Indeed, I fail to see how providing a woman with accurate information—whether relevant or irrelevant—could ever be deemed to impair *any* constitutionally protected interest (even if, as the majority hypothesizes, the information may upset her). Thus, the majority's observation that the statute may require the provision of irrelevant information in some cases is itself an irrelevancy.

Second, the majority appears to reason that the informed-consent provisions are invalid because the information they require may increase the woman's "anxiety" about the procedure and even "influence" her in her choice. Again, both observations are undoubtedly true; but they by no means cast the constitutionality of the provisions into question. It is in the very nature of informed-consent provisions that they may produce some anxiety in the patient and influence her in her choice. This is in fact their reason for existence, and—provided that the information required is accurate and nonmisleading—it is an entirely salutary reason. If information may reasonably affect the patient's choice, the patient should have that information; and, as one authority has observed, "the greater the likelihood that particular information will influence [the patient's] decision, the more essential the information arguably becomes for securing her informed consent." Appleton, Doctors, Patients and the Constitution, 63 Wash. U. L. Q. 183, 211 (1985). That the result of the provision of information may be that some women will forgo abortions by no means suggests that providing the information is unconstitutional, for the ostensible objective of *Roe* v. *Wade* is not maximizing the number of abortions, but maximizing choice. Moreover, our decisions in *Maher*, *Beal*, and *Harris* v. *McRae* all indicate that the State may encourage women to make their choice in favor of childbirth rather than abortion, and the provision of accurate information regarding abortion and its alternatives is a reasonable and fair means of achieving that objective.

Third, the majority concludes that the informed-consent provisions are invalid because they "intrud[e] upon the discretion of the pregnant woman's physician," *ante*, at 762, violate "the privacy of the informed-consent dialogue between the woman and her physician," *ibid.*, and "officially structur[e]" that dialogue, *ante*, at 763. The provisions thus constitute "state medicine" that "infringes upon [the physician's] professional responsibilities." *Ibid.* This is nonsensical. I can concede that the Constitution extends its protection to certain zones of personal autonomy and privacy, see *Griswold* v. *Connecticut*, 381 U. S., at 502 (WHITE, J., concurring in judgment), and I can understand, if not share, the notion that that protection may extend to a woman's decision regarding abortion. But I cannot concede the possibility that the Constitution provides more than minimal protection for the manner in which a physician practices his or her profession or for the "dialogues" in which he or she chooses to participate in the course of treating patients. I had thought it clear that regulation of the practice of medicine, like regulation of other professions and of economic affairs generally, was a matter peculiarly within the competence of legislatures, and that such regulation was subject to review only for rationality. See, *e. g.*, *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U. S. 483 (1955).

Were the Court serious about the need for strict scrutiny of regulations that infringe on the "judgment" of medical professionals, "structure" their relations with their patients, and amount to "state medicine," there is no telling how many state and federal statutes (not to mention principles of state tort law) governing the practice of medicine might be condemned. And of course, there would be no reason why a concern for professional freedom could be confined to the medical profession: nothing in the Constitution indicates a preference for the liberty of doctors over that of lawyers, accountants, bakers, or brickmakers. Accordingly, if the State may not "structure" the dialogue between doctor and patient, it should also follow that the State may not, for example, require attorneys to disclose to their clients information concerning the risks of representing the client in a particular proceeding. Of course, we upheld such disclosure requirements only last Term. See *Zauderer* v. *Office of Disciplinary Counsel*, 471 U. S. 626 (1985).

The rationale for state efforts to regulate the practice of a profession or vocation is simple: the government is entitled not to trust members of a profession to police themselves, and accordingly the legislature may for the most part impose such restrictions on the practice of a profession or business as it may find necessary to the protection of the public. This is precisely the rationale for infringing the professional freedom of doctors by imposing disclosure requirements upon them: "Respect for the patient's right of self-determination on particular therapy demands a standard set by law for physicians rather than one which physicians may or may not impose upon themselves." *Canterbury* v. *Spence*, 150 U. S. App. D. C., at 275, 464 F. 2d, at 784. Unless one is willing to recast entirely the law with respect to the legitimacy of state regulation of professional conduct, the obvious rationality of the policy of promoting informed patient choice on the subject of abortion must defeat any claim that the disclosure requirements imposed by Pennsylvania are invalid because they infringe on "professional freedom" or on the "physician-patient relationship."

I do not really believe that the Court's invocation of professional freedom signals a retreat from the principle that the Constitution is largely unconcerned with the substantive aspects of governmental regulation of professional and business relations. Clearly, the majority is uninterested in undermining the edifice of post-New Deal constitutional law by extending its holding to cases that do not concern the issue of abortion. But if one assumes, as I do, that the majority is unwilling to commit itself to the implications of that part of its rhetoric which smacks of economic due process rights for physicians, it becomes obvious that the talk of "infringement of professional responsibility" is mere window dressing for a holding that must stand or fall on other grounds. And because the informed-consent provisions do not infringe the essential right at issue—the right of the woman to choose to have an abortion—the majority's conclusion that the provisions are unconstitutional is without foundation.

B

The majority's decision to strike down the reporting requirements of the statute is equally extraordinary. The requirements obviously serve legitimate purposes. The information contained in the reports is highly relevant to the State's efforts to enforce § 3210(a) of the statute, which forbids abortion of viable fetuses except when necessary to the mother's health. The information concerning complications plainly serves the legitimate goal of advancing the state of medical knowledge concerning maternal and fetal health. See *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S., at 80. Given that the subject of abortion is a matter of considerable public interest and debate (constrained to some extent, of course, by the pre-emptive effect of this Court's ill-conceived constitutional decisions), the collection and dissemination of demographic information concerning abortions is clearly a legitimate goal of public policy. Moreover, there is little reason to believe that the required reports, though fairly detailed, would impose an undue burden on physicians and impede the ability of their patients to obtain abortions, as all of the information required would necessarily be readily available to a physician who had performed an abortion. Accordingly, under this Court's prior decisions in this area, the reporting requirements are constitutional. *Planned Parenthood Assn. of Kansas City, Missouri, Inc.* v. *Ashcroft*, 462 U. S. 476, 486–490 (1983) (opinion of Pow-

ELL, J.); *id.*, at 505 (opinion of O'CONNOR, J.); *Planned Parenthood of Central Missouri* v. *Danforth, supra*, at 79–81.

Nonetheless, the majority strikes down the reporting requirements because it finds that notwithstanding the explicit statutory command that the reports be made public only in a manner ensuring anonymity, "the amount of information about [the patient] and the circumstances under which she had an abortion are so detailed that identification is likely," *ante*, at 767, and that "[i]dentification is the obvious purpose of these extreme reporting requirements," *ibid.* Where these "findings" come from is mysterious, to say the least. The Court of Appeals did not make any such findings on the record before it, and the District Court expressly found that "the requirements of confidentiality in § 3214(e) regarding the identity of both patient and physician prevent any invasion of privacy which could present a legally significant burden on the abortion decision." 552 F. Supp. 791, 804 (ED Pa. 1982). Rather than pointing to anything in the record that demonstrates that the District Court's conclusion is erroneous, the majority resorts to the handy, but mistaken, solution of substituting its own view of the facts and strikes down the statute.

I can accept the proposition that a statute whose purpose and effect are to allow harassment and intimidation of citizens for their constitutionally protected conduct is unconstitutional, but the majority's action in striking down the Pennsylvania statute on this basis is procedurally and substantively indefensible. First, it reflects a complete disregard for the principle, embodied in Federal Rule of Civil Procedure 52(a), that an appellate court must defer to a trial court's findings of facts unless those findings are clearly erroneous. The Rule is expressly applicable to findings of fact that constitute the grounds for a district court's action granting or refusing a preliminary injunction, and, of course, the Rule limits this Court to the same degree as it does any other federal appellate court, see *United States* v. *General Dynamics Corp.*, 415 U. S. 486 (1974).

Second, the majority has seriously erred in purporting to make a final determination of fact, conclusive of the constitutionality of the statute, on a motion for preliminary injunction. In so doing, the Court overlooks the principle that although a district court's findings of fact on a motion for a preliminary injunction are entitled to deference on appeal from the grant or denial of preliminary relief, "the findings of fact . . . made by a court granting a preliminary injunction are *not* binding at trial on the merits" because "a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *University of Texas* v. *Camenisch*, 451 U. S. 390, 395 (1981) (emphasis added). What *Camenisch* stated to be true customarily is also true in this case: the record on which the motion for preliminary injunction was decided in the trial court consisted solely of affidavits and a stipulation of undisputed facts, none of which provides a sufficient basis for a conclusive finding on the complex question of the motive and effect of the reporting requirements and the adequacy of the statute's protection of the anonymity of doctors and patients. Issuing what amounts to a final declaratory judgment on the constitutionality of the statute under these circumstances is highly inappropriate.

Finally, in addition to being procedurally flawed, the majority's holding is substantively suspect. The information contained in the reports identifies the patient on the basis of age, race, marital status, and "political subdivision" of residence; the remainder of the information included in the reports concerns the medical aspects of the abortion. It is implausible that a particular patient could be identified on the basis of the combination of the general identifying information and the specific medical information in these reports by anyone who did not already know (at a minimum) that the woman had been pregnant and obtained an abortion.

Accordingly, the provisions pose little or no threat to the woman's privacy.

In sum, there is no basis here even for a preliminary injunction against the reporting provisions of the statute, much less for a final determination that the provisions are unconstitutional.

C

The majority resorts to linguistic nit-picking in striking down the provision requiring physicians aborting viable fetuses to use the method of abortion most likely to result in fetal survival unless that method would pose a "significantly greater medical risk to the life or health of the pregnant woman" than would other available methods. The majority concludes that the statute's use of the word "significantly" indicates that the statute represents an unlawful "trade-off" between the woman's health and the chance of fetal survival. Not only is this conclusion based on a wholly unreasonable interpretation of the statute, but the statute would also be constitutional even if it meant what the majority says it means.

The majority adopts the Court of Appeals' view that the statute's use of the term "significantly" renders it "'not susceptible to a construction that does not require the mother to bear an increased medical risk in order to save her viable fetus.'" *Ante*, at 769 (quoting 737 F. 2d 283, 300 (CA3 1984)). The term "significant" in this context, however, is most naturally read as synonymous with the terms "meaningful," "cognizable," "appreciable," or "nonnegligible." That is, the statute requires only that the risk be a real and identifiable one. Surely, if the State's interest in preserving the life of a viable fetus is, as *Roe* purported to recognize, a compelling one, the State is at the very least entitled to demand that that interest not be subordinated to a purported maternal health risk that is in fact wholly insubstantial. The statute, on its face, demands no more than this of a doctor performing an abortion of a viable fetus.

Even if the Pennsylvania statute is properly interpreted as requiring a pregnant woman seeking abortion of a viable fetus to endure a method of abortion chosen to protect the health of the fetus despite the existence of an alternative that in some substantial degree is more protective of her own health, I am not convinced that the statute is unconstitutional. The Court seems to read its earlier opinion in *Colautti* v. *Franklin*, 439 U. S. 379 (1979), as incorporating a *holding* that tradeoffs between the health of the pregnant woman and the survival of her viable fetus are constitutionally impermissible under *Roe* v. *Wade*. Of course, *Colautti* held no such thing: the Court there stated only that it did not address the "serious ethical and constitutional difficulties" that such a tradeoff would present. 439 U. S., at 400.[6] Nothing in *Colautti* or any of the Court's previous abortion decisions compels the *per se* "tradeoff" rule the Court adopts today.

The Court's ruling in this respect is not even *consistent* with its decision in *Roe* v. *Wade*. In *Roe*, the Court conceded that the State's interest in preserving the life of a viable fetus is a compelling one, and the Court has never disavowed that concession. The Court now holds that this compelling interest cannot justify *any* regulation that imposes a quantifiable medical risk upon the pregnant woman who seeks to abort a viable fetus: if attempting to save the fetus imposes any additional risk of injury to the woman, she must be permitted to kill it. This holding hardly accords with the usual understanding of the term "compelling interest," which we have used to describe those governmental interests that are so weighty as to justify substantial and ordinarily impermissible impositions on the individual—impositions that, I had thought, could include the infliction of some degree of risk of physical harm. The most obvious illustration of this principle may be found in the opinion of the elder Justice Harlan in *Jacobson* v. *Massachusetts*, 197 U. S. 11, 29 (1905): "The liberty secured by the Fourteenth Amendment . . . consists, in part, in the right of a person 'to live and work where he will,' *Allgeyer* v. *Louisiana*, 165 U. S. 578; and yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, . . . to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense." The actual holding of *Jacobson* provides another illustration, more pertinent to this particular case: the Court there sustained a regulation requiring all adult citizens of Cambridge, Massachusetts, to be vaccinated against smallpox, notwithstanding that exposure to vaccination carried with it a statistical possibility of serious illness and even death. If, as I believe these examples demonstrate, a compelling state interest may justify the imposition of some physical danger upon an individual, and if, as the Court has held, the State has a compelling interest in the preservation of the life of a viable fetus, I find the majority's unwillingness to tolerate the imposition of *any* nonnegligible risk of injury to a pregnant woman in order to protect the life of her viable fetus in the course of an abortion baffling.

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[6] Interestingly, the Court's statement seems to have assumed that the Court would have had the same authority over "ethical questions" as "constitutional issues" had it chosen to reach them—an illuminating revelation of the state of the Court's jurisprudence in this area.

The Court's ruling today that any tradeoff between the woman's health and fetal survival is impermissible is not only inconsistent with *Roe*'s recognition of a compelling state interest in viable fetal life; it directly contradicts one of the essential holdings of *Roe*—that is, that the State may forbid *all* postviability abortions except when *necessary* to protect the life or health of the pregnant woman. As is evident, this holding itself involves a tradeoff between maternal health and protection of the fetus, for it plainly permits the State to forbid a postviability abortion even when such an abortion may be statistically safer than carrying the pregnancy to term, provided that the abortion is not medically necessary.[7] The tradeoff contained in the Pennsylvania statute, even as interpreted by the majority, is no different in kind: the State has simply required that when an abortion of some kind is medically necessary, it shall be conducted so as to spare the fetus (to the greatest degree possible) unless a method less protective of the fetus is itself to some degree medically necessary for the woman. That this choice may involve the imposition of some risk on the woman undergoing the abortion should be no more troublesome than that a prohibition on nonnecessary postviability abortions may involve the imposition of some risk on women who are thereby forced to continue their pregnancies to term; yet for some reason, the Court concludes that whereas the tradeoffs it devises are compelled by the Constitution, the essentially indistinguishable tradeoff the State has attempted is foreclosed. This cannot be the law.

The framework of rights and interests devised by the Court in *Roe* v. *Wade* indicates that just as a State may prohibit a postviability abortion unless it is necessary to protect the life or health of the woman, the State may require that postviability abortions be conducted using the method most protective of the fetus unless a less protective method is necessary to protect the life or health of the woman. Under this standard, the Pennsylvania statute—which does not require the woman to accept any significant health risks to protect the fetus—is plainly constitutional.

D

The Court strikes down the statute's second-physician requirement because, in its view, the existence of a medical emergency requiring an immediate abortion to save the life of the pregnant woman would not be a defense to a prosecution under the statute. The Court does not question the proposition, established in the *Ashcroft* case, that a second-physician requirement accompanied by an exception for emergencies is a permissible means of vindicating the compelling state interest in protecting the lives of viable fetuses. Accordingly, the majority's ruling on this issue does not on its face involve a substantial departure from the Court's previous decisions.

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[7] Surely it cannot be argued that any abortion that is safer than delivery is medically necessary, since under such a definition an abortion would be medically necessary in all pregnancies.

What is disturbing about the Court's opinion on this point is not the general principle on which it rests, but the manner in which that principle is applied. The Court brushes aside the fact that the section of the statute in which the second-physician requirement is imposed states that "[i]t shall be a complete defense to *any* charge brought against a physician for violating the requirements *of this section* that he had concluded, in good faith, in his best medical judgment, . . . that the abortion was necessary to preserve maternal life or health" (emphasis added). 18 Pa. Cons. Stat. § 3210(a) (1982). This language is obviously susceptible of the construction the State advances: namely, that it is a defense to a charge of violating the second-physician requirement that the physician performing the abortion believed that performing an abortion in the absence of a second physician was necessary to the life or health of the mother.

The Court's rejection of this construction is based on its conclusion that the statutory language "does not relate to the second-physician requirement" and that "its words are not words of emergency." *Ante*, at 771. This reasoning eludes me. The defense of medical necessity "relates" to any charge that a doctor has violated one of the requirements of the section in which it appears, and the second-physician requirement is imposed by that section. The defense thus quite evidently "relates" to the second-physician requirement. True, the "words" of the defense are not "words of emergency," but words of necessity. Why this should make a difference is unclear: a defense of medical necessity is fully as protective of the interests of the pregnant woman as a defense of "emergency." The Court falls back, *ibid.*, on the notion that the legislature "knows how to provide a medical-emergency exception when it chooses to do so." No doubt. But the legislature obviously also "knows how" to provide a medical-necessity exception, and it has done so. Why this exception is insufficient is unexplained and inexplicable.

The Court's rejection of a perfectly plausible reading of the statute flies in the face of the principle—which until today I had thought applicable to abortion statutes as well as to other legislative enactments—that "[w]here fairly possible, courts should construe a statute to avoid a danger of unconstitutionality." *Planned Parenthood Assn. of Kansas City, Missouri, Inc.* v. *Ashcroft*, 462 U. S., at 493. The Court's reading is obviously based on an entirely different principle: that in cases involving abortion, a permissible reading of a statute is to be avoided at all costs. Not sharing this viewpoint, I cannot accept the majority's conclusion that the statute does not provide for the equivalent of a defense of emergency.[8]

E

Finally, the majority refuses to vacate the preliminary injunction entered against the enforcement of the parental notice and consent provisions of the statute. See *ante*, at 758, n. 9. The reason offered is that the propriety of the injunction depends upon the adequacy of the rules, recently promulgated by the Pennsylvania Supreme Court, setting forth procedures by which a minor desiring an abortion may speedily and confidentially obtain either judicial approval of her decision to obtain an abortion or a judicial determination that she herself is capable of an informed consent to the procedure. The Court concludes that review of the rules is best carried out in the first instance in the District Court.

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[8] Even if I were to accept the majority's conclusion that the medical-necessity defense of § 3210(a) is not specifically applicable to charges brought under § 3210(c), I would not strike down the statute. Under Pennsylvania criminal law, justification is a defense, see 18 Pa. Cons. Stat. § 502 (1982), and, under the general rule of justification, conduct is deemed justified if "the actor believes [it] to be necessary to avoid a harm or evil to . . . another," and "the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged." § 503(a)(1). I have little doubt that a Pennsylvania court applying this statute would find noncompliance with the second-physician rule justified where necessary to save the life of the pregnant woman.

The Court's decision in *Ashcroft*, however, compels the conclusion that the Third Circuit erred in directing that the operation of the parental notice and consent provisions be enjoined pending promulgation of the required rules; accordingly, the injunction should be vacated irrespective of the adequacy of those rules. As the Court of Appeals apparently recognized, the Pennsylvania statute, on its face, is substantively identical to that upheld by the Court in *Ashcroft;* thus, the sole basis for the injunction ordered by the Court of Appeals was the absence of procedural rules implementing the statute. What the Court of Appeals failed to recognize was that this Court denied relief to the plaintiffs challenging the statute in *Ashcroft* despite the same purported defect: in that case, as in this, the State Supreme Court had not yet promulgated rules establishing the expedited procedures called for by the statute. Nonetheless, as JUSTICE POWELL's opinion explained, the plaintiffs were not entitled to any relief against enforcement of the statutory scheme, as "[t]here is no reason to believe that [the State] will not expedite any appeal consistent with the mandate in our prior opinions." 462 U. S., at 491, n. 16. Similarly, there was no reason here for the Court of Appeals to believe that Pennsylvania would not provide for the adequate, expedited procedures contemplated by the statute; thus, its entry of an injunction against enforcement of the statute was erroneous.

III

The decision today appears symptomatic of the Court's own insecurity over its handiwork in *Roe* v. *Wade* and the cases following that decision. Aware that in *Roe* it essentially created something out of nothing and that there are many in this country who hold that decision to be basically illegitimate, the Court responds defensively. Perceiving, in a statute implementing the State's legitimate policy of preferring childbirth to abortion, a threat to or criticism of the decision in *Roe* v. *Wade,* the majority indiscriminately strikes down statutory provisions that in no way contravene the right recognized in *Roe.* I do not share the warped point of view of the majority, nor can I follow the tortuous path the majority treads in proceeding to strike down the statute before us. I dissent.

JUSTICE O'CONNOR, with whom JUSTICE REHNQUIST joins, dissenting.

This Court's abortion decisions have already worked a major distortion in the Court's constitutional jurisprudence. See *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 452 (1983) (O'CONNOR, J., dissenting). Today's decision goes further, and makes it painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion. The permissible scope of abortion regulation is not the only constitutional issue on which this Court is divided, but—except when it comes to abortion—the Court has generally refused to let such disagreements, however longstanding or deeply felt, prevent it from evenhandedly applying uncontroversial legal doctrines to cases that come before it. See *Heckler* v. *Chaney*, 470 U. S. 821, 838 (1985); *id.*, at 839–840, n. 2 (BRENNAN, J., concurring) (differences over the validity of the death penalty under the Eighth Amendment should not influence the Court's consideration of a question of statutory administrative law). That the Court's unworkable scheme for constitutionalizing the regulation of abortion has had this institutionally debilitating effect should not be surprising, however, since the Court is not suited to the expansive role it has claimed for itself in the series of cases that began with *Roe* v. *Wade*, 410 U. S. 113 (1973).

The Court today holds that "[t]he Court of Appeals correctly invalidated the specified provisions of Pennsylvania's 1982 Abortion Control Act." *Ante*, at 772. In so doing, the Court prematurely decides serious constitutional questions on an inadequate record, in contravention of settled principles of constitutional adjudication and procedural fairness. The constitutionality of the challenged provisions was not properly before the Court of Appeals, and is not properly before this Court. There has been no trial on the merits, and appellants have had no opportunity to develop facts that might have a bearing on the constitutionality of the statute. The only question properly before the Court is whether or not a preliminary injunction should have been issued to restrain enforcement of the challenged provisions pending trial on the merits. This Court's decisions in *Akron* v. *Akron Center for Reproductive Health*, *supra*, *Planned Parenthood Assn. of Kansas City, Missouri, Inc.* v. *Ashcroft*, 462 U. S. 476 (1983), and *Simopoulos* v. *Virginia*, 462 U. S. 506 (1983), do not establish a likelihood that appellees would succeed on the merits of their constitutional claims sufficient to warrant overturning the District Court's denial of a preliminary injunction. Under the approach to abortion regulation outlined in my dissenting opinion in *Akron*, to which I adhere, it is even clearer that no preliminary injunction should have issued. I therefore dissent.

I

The only issue before the District Court in this case was whether to grant appellees' motion for a preliminary injunction against enforcement of Pennsylvania's Abortion Control Act. The limited record before the District Court consisted of affidavits submitted by appellees, the parties' memoranda of law, the Act itself, including the findings of the Pennsylvania Legislature, and a stipulation of uncontested facts. As the District Judge noted, this stipulation "was entered into solely for the purpose of the motion for preliminary injunction." 552 F. Supp. 791, 794, n. 1 (ED Pa. 1982). Indeed, the parties expressly provided that the stipulation should be "without prejudice to any party's right to controvert any facts or to prove any additional facts at any later proceeding in this action." App. 9a–10a. In light of the stipulation of uncontested facts, no testimony or evidence was submitted at the hearing on the motion for a preliminary injunction.

In these circumstances, the District Judge's consideration of the motion before him was governed by the black letter law recapitulated in *University of Texas* v. *Camenisch*, 451 U. S. 390, 395 (1981):

> "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary injunction hearing, and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits. In light of these considerations, it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits.
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> "Should an expedited decision on the merits be appropriate, Rule 65(a)(2) of the Federal Rules of Civil Procedure provides a means of securing one. That Rule permits a court to 'order the trial of the action on the merits to be advanced and consolidated with the hearing of the application.' Before such an order may issue, however, the courts have commonly required that 'the parties should normally receive clear and unambiguous notice [of

> the court's intent to consolidate the trial and the hearing] either before the hearing commences or at a time which will still afford the parties a full opportunity to present their respective cases'" (citations omitted).

The District Judge scrupulously adhered to these settled principles. He granted the preliminary injunction as to one provision of the Act, and denied preliminary relief as to all the other challenged provisions. Having seen no occasion to issue a Rule 65 order, he properly refrained from rendering final judgment on the merits by declaratory judgment or otherwise. That the District Judge understood the preliminary nature of the proceedings, and ruled accordingly, is incontrovertible:

> "I have applied the traditional criteria applicable to a motion for preliminary injunction: likelihood of success on the merits, irreparable harm if the relief is not granted, possibility of harm to the non-moving party, and where relevant, harm to the public. Given the importance of the right involved in this litigation, I have assumed that if the plaintiffs were able to show likelihood of success on the merits, then the irreparable harm requirement would be met. I conclude that in only one instance, the 24-hour waiting period, did the plaintiffs carry their burden of demonstrating likelihood of success on the merits.
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> . . . . .
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> "My adjudication is limited to the plaintiffs' request for a *preliminary* injunction. It is circumscribed by the record produced by the parties and the arguments advanced in the briefs on this motion. After applying the criteria for a preliminary injunction, I conclude that the only portion of the Act which the plaintiffs have demonstrated should be preliminarily enjoined is the 24-hour waiting period. In all other respects, the plaintiffs have failed to show a right to a preliminary injunction pending

> the outcome of the trial on the merits." 552 F. Supp., at 811 (emphasis in original).

The District Judge correctly discerned that "[t]he traditional standard for granting a preliminary injunction requires a plaintiff to show that in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits." *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 931 (1975). Unsurprisingly, the likelihood of success on the merits emerged, in the District Judge's view, as the most important factor in determining whether an injunction should issue in this case. In sum, when the District Judge denied appellees' motion for a preliminary injunction, he faithfully applied uncontroversial criteria for ruling on such motions and rendered a decision that "was not in any sense intended as a final decision as to the constitutionality of the challenged statute." *Brown* v. *Chote*, 411 U. S. 452, 456 (1973).

When the appeal was taken to the Court of Appeals for the Third Circuit, that court's review should have been limited to determining whether the District Court had abused its discretion in denying *preliminary* relief. *Doran, supra*, at 931–932; *Brown, supra*, at 457. If the Court of Appeals concluded that the District Court had committed legal errors that infected its assessment of the likelihood that appellees would succeed on the merits, the Court of Appeals should then have addressed the remaining factors that make up the preliminary injunction inquiry. If it concluded that denial of the preliminary injunction was an abuse of discretion, it should have entered judgment providing for entry of a preliminary injunction. What it should *not* have done, and what it did do, was to issue a final, binding declaration on the merits of appellees' constitutional claims.

The Court concedes that a court of appeals should ordinarily review the denial of a preliminary injunction under an abuse of discretion standard, and it concedes that a court of appeals should ordinarily confine itself to assessing the "probability that the plaintiffs would succeed on the merits."

Ante, at 755. But the Court purports to find an exception to this rule in the decisions in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952), and *Smith* v. *Vulcan Iron Works*, 165 U. S. 518 (1897). It asserts that these cases indicate that "if a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance, that ruling may be reviewed even though the appeal is from the entry of a preliminary injunction." *Ante*, at 757. The Court then announces that the requirement that appellate review proceed under the deferential abuse of discretion standard is "a rule of orderly judicial administration, not a limit on judicial power." *Ibid.* Postulating that the Court of Appeals had a "full record before it on the issues now before us," *ibid.*, the Court concludes that this "full record," and the fact that this Court's decisions in *Akron*, *Ashcroft*, and *Simopoulos* were handed down during the pendency of the appeal, justified the Court of Appeals "in proceeding to plenary review of those issues." *Ante*, at 757.

This analysis mischaracterizes the proceedings in the District Court and is unsupported by precedent or logic. No one doubts that the legal premises on which the District Judge proceeded were reviewable. But the fact is that the District Judge did not make the final, definitive "ruling" on the merits the Court imputes to him. The only "ruling" the Court of Appeals had before it with respect to the merits was a determination of "likelihood of success" based on facts which were stipulated *only* for purposes of the preliminary injunction motion, and on arguments framed with a view toward only those facts. Nor was there a "full record" upon which the Court of Appeals could decide the merits. The Court falls into precisely the error pointed out in *Camenisch*, 451 U. S., at 394, where this Court unanimously rejected the proposition that determinations on the propriety of preliminary relief are "tantamount to decisions on the underlying merits," because that view "improperly equates 'likelihood of success' with 'success,' and what is more important, . . . ignores the significant procedural differences between preliminary and permanent injunctions."

The Court of Appeals was convinced that the District Judge, in reliance on the decisions of the Courts of Appeals that were later reviewed in *Akron* and *Ashcroft*, had taken a view of the applicable law which this Court's decisions in those cases demonstrated to be erroneous. Citing *Apple Computer, Inc.* v. *Franklin Computer Corp.*, 714 F. 2d 1240, 1242 (CA3 1983), cert. dism'd under this Court's Rule 53, 464 U. S. 1033 (1984), the Court of Appeals stated that "[t]he customary discretion accorded to a district court's ruling on a preliminary injunction yields to our plenary scope of review as to the applicable law." 737 F. 2d 283, 290 (1984). *Apple Computer*, in turn, relied on Judge Friendly's opinion for the Second Circuit in *Donovan* v. *Bierwirth*, 680 F. 2d 263, 269, cert. denied, 459 U. S. 1069 (1982): "Despite oft repeated statements that the issuance of a preliminary injunction rests in the discretion of the trial judge whose decisions will be reversed only for 'abuse', a court of appeals must reverse if the district court has proceeded on the basis of an erroneous view of the applicable law, or of the standards governing the granting or denial of interlocutory relief" (citations omitted).

Donovan's reasoning, however, goes only to the *standard* of appellate review, not to the *extent* of the issues to be reviewed. Whether or not *Donovan*'s approach is sound, it is clear that a district court does not have discretion to rule on the basis of a misapprehension of controlling law. But even assuming, *arguendo*, that, where a court of appeals detects such an error, it may then engage in *de novo* review of the determination whether a preliminary injunction should issue, see 680 F. 2d, at 270, such discretion does not ordinarily extend to deciding the merits of the controversy with finality. Judge Friendly did no such thing in *Donovan*, *id.*, at 276, nor did the Third Circuit in *Apple Computer*, see 714 F. 2d, at 1242.

What is at issue here is a matter of legal principle. As JUSTICE BLACKMUN has observed on a previous occasion: "The distinction between the preliminary and final injunction stages of a proceeding is more than mere formalism. The time pressures involved in a request for a preliminary injunction require courts to make determinations without the aid of full briefing or factual development, and make all such determinations necessarily provisional." *Firefighters* v. *Stotts*, 467 U. S. 561, 603–604, n. 7 (1984) (dissenting opinion). The holding of the Court today thus comes at the expense of the basic principle underlying the framework set out in *Camenisch* for ruling on a motion for a preliminary injunction: that fairness to the parties and reliable adjudication of disputes require final, binding rulings on the merits of a controversy to be made only after each side has had an opportunity to establish its version of the disputed facts or to establish that the facts are not in dispute.

Equally neglected by the Court is a second principle, closely related to the first:

> "Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *Hormel* v. *Helvering*, 312 U. S. 552, 556 (1941).

See also *Singleton* v. *Wulff*, 428 U. S. 106, 120–121 (1976); cf. *Fountain* v. *Filson*, 336 U. S. 681, 683 (1949) *(per curiam)* (reversing a summary judgment order "made on appeal on a

new issue as to which the opposite party had no opportunity to present a defense before the trial court"). The cases on which the Court relies simply do not support the short shrift the Court gives these basic principles.

In *Youngstown Sheet & Tube Co.*, President Truman, invoking an immediate threat to the national defense precipitated by a threatened nationwide strike in the steel industry, ordered the Secretary of Commerce to seize the steel mills and keep them running. 343 U. S., at 583. The steel companies sought a declaratory judgment, a preliminary injunction, and a permanent injunction against the seizure, on the grounds that the President had no authority to order it. *Ibid.* Although the District Court had before it only "motions for temporary injunctions" when it ruled, 103 F. Supp. 569, 572 (DC 1952), "in the light of the facts presented, the District Court saw no reason for delaying decision of the constitutional validity of the orders." *Youngstown Sheet & Tube Co.*, *supra*, at 585. Indeed, the District Court had "com[e] to a fixed conclusion . . . that defendant's acts are illegal. . . . Nothing that could be submitted at such trial on the facts would alter the legal conclusion I have reached." 103 F. Supp., at 576.

Thus, the District Court's preliminary injunction in *Youngstown Sheet & Tube Co.* rested on what amounted to a declaratory judgment that the orders were constitutionally invalid. That in itself was a pronounced departure from normal practice, although one that this Court found proper in the highly unusual circumstances presented in *Youngstown Sheet & Tube Co.*, where time was manifestly of the essence,* and there was no contention that the Government had been deprived of an opportunity to present facts that could have altered the resolution of the constitutional question. To the contrary, when "[p]laintiffs moved for a preliminary injunction before answer or hearing, [d]efendant opposed the motion, filing uncontroverted affidavits of Government officials describing the facts underlying the President's order." 343 U. S., at 678 (Vinson, C. J., dissenting).

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*The extraordinary importance of prompt resolution of the steel companies' claims is shown by the fact that this Court granted certiorari before judgment in the Court of Appeals three days after the District Court ruled, and set the case for argument nine days later, "[d]eeming it best that the issues raised be promptly decided by this Court." 343 U. S., at 584.

Neither of the foregoing justifications for the District Court's unusual decision to reach the merits in *Youngstown Sheet & Tube* is present here. No emergency remotely comparable to the one in *Youngstown Sheet & Tube* confronted the Court of Appeals, which granted appellees' motion to enjoin enforcement of the entire Act pending appeal, and withheld judgment until after this Court had ruled in *Akron* and its companion cases. 737 F. 2d, at 290. Appellants conceded in the Court of Appeals that several provisions of the Abortion Act were unconstitutional in the wake of those decisions, but appellants did not concede that the provisions on which the Court of Appeals dispositively ruled were unconstitutional. Nor is there any suggestion that appellants conceded in the Court of Appeals that there were no factual issues that could have a bearing on the constitutionality of these provisions. Consequently, even if a preliminary injunction should have issued, the proper course would have been to remand for final determination of the merits.

Indeed, since *Youngstown Sheet & Tube Co.* was decided this Court has expressly reaffirmed that "a state statute should not be declared unconstitutional by a district court if a preliminary injunction is granted a plaintiff to protect his interests during the ensuing litigation." *Withrow* v. *Larkin*, 421 U. S. 35, 43 (1975). See *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U. S. 310 (1940). If it is improper for a district court to enter such a declaratory judgment when it grants a preliminary injunction, then *a fortiori* it is improper for a court of appeals to do so when the district court has only appraised the likelihood of success on the merits. What happened here is even more extreme: the Court of Appeals, reviewing the *denial* of a preliminary injunction, held in the first instance that nothing that could be submitted at a trial on the merits would alter *its* conclusion that "most of the provisions attacked by appellants are unconstitutional as a matter of law." 737 F. 2d, at 287. Nothing in *Youngstown Sheet & Tube Co.* remotely suggests that it was proper for the Court of Appeals to take this extraordinary step. "*Camenisch* makes clear that a determination of a party's entitlement to a preliminary injunction is a separate issue from the determination of the merits of the party's underlying legal claim, and that a reviewing court should not confuse the two." *Stotts*, 467 U. S., at 603 (BLACKMUN, J., dissenting).

The Court strays even further afield when it invokes *Smith* v. *Vulcan Iron Works* in defense of the Court of Appeals' decision to reach and resolve the merits despite the fact that the District Court had not done so and without giving the parties "the benefit . . . of a full opportunity to present their cases." *Camenisch*, 451 U. S., at 396. The trial court in *Smith*, "upon a bill in equity for the infringement of a patent for an invention . . . entered an interlocutory decree, *adjudging that the patent was valid and had been infringed*, granting an injunction, and referring the case to a master to take an account of profits and damages." 165 U. S., at 518 (emphasis added). The defendant challenged the trial court's alleged "error in holding that the patent was valid, and that it had been infringed." *Ibid.* The Circuit Court of Appeals reversed the decree, rejecting the plaintiff's contention that it could rule only on "whether an injunction should be awarded." *Ibid.* This Court held that under the plain language of the statute conferring jurisdiction on the Circuit Court of Appeals, an appeal was authorized "from the whole of such interlocutory order or decree, and not from that part of it only which grants or continues an injunction," and consequently the statute conferred "authority to consider and decide the case upon its merits." *Id.*, at 525. The trial court, of course, had already done precisely that, deciding the issue of liability after the parties had joined issue on the merits, while referring the matter of damages to a master. Reliance on *Smith* in this case is therefore misplaced, for, to repeat, the District Court did not decide—and could not properly have decided—the merits of appellees' constitutional claims when it refused to grant a preliminary injunction.

The Court also seeks comfort in an analogy to the rule that a federal court need not abstain, pending state-court review, from reviewing a constitutional challenge to the validity of a state statute that is not fairly subject to an interpretation that will avoid the constitutional question. *Zwickler* v. *Koota*, 389 U. S. 241, 251, and n. 14 (1967). When a federal district court declines to abstain, however, it does not in so doing decide the merits of the constitutional question even if the parties have not had a full opportunity to air them. The court simply proceeds to decide the case in accordance with the normal procedural requirements that safeguard the parties' rights to be heard. A refusal to abstain therefore infringes neither the principle that final judgment should follow a full opportunity to be heard on the factual and legal merits of the case, nor the principle that "parties shall come to issue in the trial forum vested with authority to determine questions of fact." *Hormel*, 312 U. S., at 556. The same cannot be said of what the Court of Appeals did here.

Whatever the exceptions which would justify a district court in finally resolving an issue on the merits at the preliminary injunction stage, no such exception was applicable here. Nor is this a case in which the court of appeals was justified in resolving an issue not passed on in the district court because proper resolution was beyond any doubt or grave injustice might result from failure to do so. See *Singleton* v. *Wulff*, 428 U. S., at 121. The Court of Appeals not only decided to stand in the shoes of the District Court by ruling on an issue not passed upon below—it ruled on an issue on which, absent extraordinary circumstances, the District Court could not have ruled without "'clear and unambiguous notice'" that would "'afford the parties a full opportunity to present their respective cases.'" *Camenisch, supra,* at 395. The Court attempts to veil the impropriety of its decision to affirm on the merits despite the procedural posture of this case by implying that the challenged provisions are patently unconstitutional. But this claim too is unsupported in this Court's decisions concerning state regulation of abortion.

The discretionary exception the Court fashions today will also prove vexatious to administer. Parties now face the risk that a final ruling on the merits will be entered against them by a court of appeals when an appeal is taken from the grant or denial of a motion for a preliminary injunction, although the district court made only an initial assessment of the likelihood that the moving party would succeed on the merits. It is predictable that parties will respond by attempting to turn preliminary injunction proceedings into contests over summary judgment or full-scale trials on the merits. That tendency will make the preliminary injunction less useful in serving its intended function of preserving the status quo pending final judgment on the merits, while making litigation more expensive, less reliable, and less fair. If this case did not involve state regulation of abortion, it may be doubted that the Court would entertain, let alone adopt, such a departure from its precedents.

II

In this Court, appellants argue that the judgment of the Court of Appeals should be vacated and the District Court's denial of a preliminary injunction sustained. Appellants have stated that they "intend to present to the District Court a complete factual record which . . . could affect the disposition of this case," and have indicated some of the specific factual propositions they would seek to establish. Brief for Appellants 44–48. At oral argument, counsel for appellants reiterated that, with the exception of the second-physician requirement, "there are additional justifications by way of facts that we can offer" as to each of the challenged provisions. Tr. of Oral Arg. 13. These assertions alone would justify vacating the judgment of the Court of Appeals insofar as that court did more than direct the entry of a preliminary injunction. In *Singleton* v. *Wulff, supra,* at 120, for example, this Court reversed the Court of Appeals' decision to reach the merits of that case, even though this Court had "no idea what evidence, if any, petitioner would, or could, offer in defense of this statute," because it was clear that "petitioner has had no opportunity to proffer such evidence." I would apply that reasoning here even if I were not persuaded that as to several of the challenged provisions additional factual development—for example, facts concerning the costs associated with the reporting and informed consent provisions, and the extent of the problems Pennsylvania was seeking to correct—could affect the decision on the merits. Appellants should not have to prove that they are entitled to an opportunity to be heard.

Since it rendered "what amounts to a final declaratory judgment on the constitutionality of the statute," *ante,* at 806 (WHITE, J., dissenting), the Court of Appeals necessarily believed that in light of *Akron* and its companion cases appellees had established a sufficient likelihood of success on the merits to warrant issuance of a preliminary injunction. Pennsylvania contends that this ruling is erroneous even under the supervening decisions of this Court. In the alternative, Pennsylvania suggests that the facial constitutionality of the challenged provisions of its Abortion Act may be sustained on this record.

I agree with much of what JUSTICE WHITE has written in Part II of his dissenting opinion, and the arguments he has framed might well suffice to show that the provisions at issue are facially constitutional. Nonetheless, I believe the proper course is to decide this case as the Court of Appeals should have decided it, lest appellees suffer the very prejudice the Court sees fit to inflict on appellants. For me, then, the question is not one of "success" but of the "likelihood of success." In addition, because Pennsylvania has not asked the Court to reconsider or overrule *Roe* v. *Wade*, 410 U. S. 113 (1973), I do not address that question.

I do, however, remain of the views expressed in my dissent in *Akron*, 462 U. S., at 459–466. The State has compelling interests in ensuring maternal health and in protecting potential human life, and these interests exist "throughout pregnancy." *Id.*, at 461 (O'CONNOR, J., dissenting). Under this Court's fundamental-rights jurisprudence, judicial scrutiny of state regulation of abortion should be limited to whether the state law bears a rational relationship to legitimate purposes such as the advancement of these compelling interests, with heightened scrutiny reserved for instances in which the State has imposed an "undue burden" on the abortion decision. *Id.*, at 461–463 (O'CONNOR, J., dissenting). An undue burden will generally be found "in situations involving absolute obstacles or severe limitations on the abortion decision," not wherever a state regulation "may 'inhibit' abortions to some degree." *Id.*, at 464 (O'CONNOR, J., dissenting). And if a state law does interfere with the abortion decision to an extent that is unduly burdensome, so that it becomes "necessary to apply an exacting standard of review," *id.*, at 467 (O'CONNOR, J., dissenting), the possibility remains that the statute will withstand the stricter scrutiny. See *id.*, at 473–474 (O'CONNOR, J., dissenting); *Ashcroft*, 462 U. S., at 505 (O'CONNOR, J., concurring in judgment in part and dissenting in part).

These principles for evaluating state regulation of abortion were not newly minted in my dissenting opinion in *Akron*. Apart from *Roe*'s outmoded trimester framework, the "unduly burdensome" standard had been articulated and applied with fair consistency by this Court in cases such as *Harris* v. *McRae*, 448 U. S. 297, 314 (1980), *Maher* v. *Roe*, 432 U. S. 464, 473 (1977), *Beal* v. *Doe*, 432 U. S. 438, 446 (1977), and *Bellotti* v. *Baird*, 428 U. S. 132, 147 (1976). In *Akron* and

Ashcroft the Court, in my view, distorted and misapplied this standard, see *Akron*, 462 U. S., at 452–453 (O'CONNOR, J., dissenting), but made no clean break with precedent and indeed "follow[ed] this approach" in assessing some of the regulations before it in those cases. *Id.*, at 463 (O'CONNOR, J., dissenting).

The Court today goes well beyond mere distortion of the "unduly burdensome" standard. By holding that each of the challenged provisions is facially unconstitutional as a matter of law, and that no conceivable facts appellants might offer could alter this result, the Court appears to adopt as its new test a *per se* rule under which any regulation touching on abortion must be invalidated if it poses "an unacceptable danger of deterring the exercise of that right." *Ante*, at 767. Under this prophylactic test, it seems that the mere possibility that some women will be less likely to choose to have an abortion by virtue of the presence of a particular state regulation suffices to invalidate it. Simultaneously, the Court strains to discover "the anti-abortion character of the statute," *ante*, at 764, and, as JUSTICE WHITE points out, invents an unprecedented canon of construction under which "in cases involving abortion, a permissible reading of a statute is to be avoided at all costs." *Ante*, at 812 (dissenting). I shall not belabor the dangerous extravagance of this dual approach, because I hope it represents merely a temporary aberration rather than a portent of lasting change in settled principles of constitutional law. Suffice it to say that I dispute not only the wisdom but also the legitimacy of the Court's attempt to discredit and pre-empt state abortion regulation regardless of the interests it serves and the impact it has.

Under the "unduly burdensome" test, the District Judge's conclusion that appellees were not entitled to a preliminary injunction was clearly correct. Indeed, the District Judge applied essentially that test, after suggesting that no "meaningful distinction can be made between the plaintiffs' 'legally significant burden' and defendants' 'undue burden.'" 552 F. Supp., at 796. I begin, as does the Court, with the Act's informed consent provisions.

The Court condemns some specific features of the informed consent provisions of § 3205, and issues a blanket condemnation of the provisions in their entirety as irrelevant or distressing in some cases and as intruding on the relationship between the woman and her physician. JUSTICE WHITE convincingly argues that none of the Court's general criticisms is appropriate, since the information is clearly relevant in many cases and is calculated to inform rather than intimidate, and since all informed consent requirements must, from the very rationale for their existence, intrude to some extent on the physician's discretion to be the sole judge of what his or her patient needs to know. The "parade of horribles" the Court invalidated in *Akron*, *supra*, at 445, is missing here. For example, § 3205(a)(iii) requires that the woman be informed, "when medically accurate," of the risks associated with a particular abortion procedure, and § 3205(a)(v) requires the physician to inform the woman of "[t]he medical risks associated with carrying her child to term." This is the kind of balanced information I would have thought all could agree is relevant to a woman's informed consent.

I do not dismiss the possibility that requiring the physician or counselor to read aloud the State's printed materials if the woman wishes access to them but cannot read raises First Amendment concerns. Even the requirement that women who can read be informed of the availability of those materials, and furnished with them on request, may create some possibility that the physician or counselor is being required to "communicate [the State's] ideology." *Akron*, *supra*, at 472, n. 16 (O'CONNOR, J., dissenting); see *Wooley* v. *Maynard*, 430 U. S. 705 (1977). Since the Court of Appeals did not reach appellees' First Amendment claim, and since appellees do not raise it here, I need not decide whether this potential problem would be sufficiently serious to warrant issuance of a preliminary injunction as to those portions of § 3205 that incorporate the printed information provisions of § 3208. I note, however, that this is one of many points on which fuller factual development, including the actual contents of the printed materials, could affect resolution of the merits.

The Court singles out for specific criticism the required description, in the printed materials, of fetal characteristics at 2-week intervals. These materials, of course, will be shown to the woman only if she chooses to inspect them. If the materials were sufficiently inflammatory and inaccurate the fact that the woman must ask to see them would not necessarily preclude finding an undue burden, but there is no indication that this is true of the description of fetal characteristics the statute contemplates. Accordingly, I think it unlikely that appellees could succeed in making the threshold showing of an undue burden on this point, and the information is certainly rationally related to the State's interests in ensuring informed consent and in protecting potential human life. Similarly, I see little chance that appellees can establish that the abortion decision is unduly burdened by § 3205's requirements that the woman be informed of the availability of medical assistance benefits and of the father's legal responsibility. Here again, the information is indisputably relevant in many cases and would not appear to place a severe limitation on the abortion decision.

The Court's rationale for striking down the reporting requirements of § 3214, as JUSTICE WHITE shows, rests on an unsupported finding of fact by this Court to the effect that "[i]dentification is the obvious purpose of these extreme reporting requirements." *Ante*, at 767 (opinion of the Court). The Court's "finding," which is contrary to the preliminary finding of the District Judge that the statute's confidentiality requirements protected against any invasion of privacy that could burden the abortion decision, see 552 F. Supp., at 804, is simply another consequence of the Court's determination to prevent the parties from developing the facts. I do not know whether JUSTICE WHITE is correct in stating that "the provisions pose little or no threat to the woman's privacy," *ante*, at 807 (dissenting), and I would leave that determination for the District Court, which can hear evidence on this point before making its findings. I do not, however, see a substantial threat of identification on the face of the statute, which does not require disclosure of the woman's identity to anyone, and which provides that reports shall be disclosed to the public only in "a form which will not lead to the disclosure of the identity of any person filing a report." § 3214(e)(2). I therefore conclude that the District Judge correctly ruled that appellees are unlikely to succeed in establishing an undue burden on the abortion decision stemming from the possibility of identification.

I fully agree with JUSTICE WHITE that the Court has misconstrued the intended meaning of § 3210(b)'s requirement that physicians employ the abortion method that is most likely to save the fetus unless, in the physician's good-faith judgment, that method "would present a significantly greater risk to the life or health of the pregnant woman." Since § 3210(b) can fairly be read to require "only that the risk be a real and identifiable one," *ante*, at 807 (WHITE, J., dissenting), there is little possibility that a woman's abortion decision will be unduly burdened by risks falling below that threshold. Accordingly, § 3210(b) should not be preliminarily enjoined, and I express no opinion as to the point at which a "trade-off" between the health of the woman and the survival of the fetus would rise to the level of an undue burden.

Since appellants and appellees agree that no further factfinding is needed concerning appellees' challenge to § 3210(c)'s second-physician requirement, I am willing to assume that the merits of that challenge are properly before us. I have nothing to add to JUSTICE WHITE'S demonstration that this provision is constitutional under *Ashcroft* because the Act effectively provides for an exception making this requirement inapplicable in emergency situations. I likewise agree with JUSTICE WHITE that the preliminary injunction entered against enforcement of the Act's parental notice and consent provisions should be vacated, since, as in *Ashcroft*, there is no reason here to believe that the State will not provide for the expedited procedures called for by its statute. See *Ashcroft*, 462 U. S., at 491, n. 16 (opinion of POWELL, J.). I add only that the Court's explanation for its refusal to follow *Ashcroft*—that the new rules "should be considered by the District Court in the first instance," *ante*, at 758, n. 9—does not square with its insistence on resolving the rest of this case without giving the District Court an opportunity to do so.

In my view, today's decision makes bad constitutional law and bad procedural law. The "'undesired and uncomfortable straitjacket'" in this case, *ante*, at 762, is not the one the Court purports to discover in Pennsylvania's statute; it is the one the Court has tailored for the 50 States. I respectfully dissent.

UNITED STATES *v.* MOTTAZ

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 85-546. Argued April 22, 1986—Decided June 11, 1986

Respondent inherited interests in three Indian allotments, title to which was held in trust by the United States. In 1954, the Government sold the allotments to the United States Forest Service despite the lack of express consent from every person who held an interest in the allotments. In 1967, respondent expressed an interest to the Bureau of Indian Affairs in selling her inherited Indian lands, and the BIA provided her with a list of her allotment interests but did not mention the three allotments that had already been sold. In response to a specific inquiry in 1981, the BIA informed respondent that the allotments had been sold. Respondent then filed suit against the United States in Federal District Court, claiming jurisdiction under, *inter alia*, the General Allotment Act of 1887 and the Tucker Act, and alleging that the sale of her interests was void. She sought damages equal to the current fair market value of her interests. The District Court ruled that her claims were barred by the general 6-year statute of limitations governing actions against the United States. The Court of Appeals reversed, holding that that statute does not bar claims of title to Indian allotments but that since the statute of limitations question depended on resolving several preliminary issues the case would be remanded to the District Court. The Court of Appeals denied the Government's petition for a rehearing wherein the Government claimed that the suit was barred, not by the general statute of limitations, but by the 12-year limitations period of the Quiet Title Act of 1972.

Held: Respondent's suit is "a civil action . . . to adjudicate a disputed title to real property in which the United States claims an interest," within the meaning of the Quiet Title Act, and therefore is barred by that Act's 12-year limitations period. Pp. 841-851.

(a) The relief respondent seeks confirms this characterization of her suit. What she seeks is a declaration that she alone possesses valid title to the interests in question and that the title the United States asserts is defective, and an order requiring the United States to pay her the value of her interests today in order properly to transfer title. The provision of the Quiet Title Act that it "does not apply to trust or restricted Indian lands" operates solely to retain the United States' immunity from suit by third parties challenging the United States' title to land held in trust for

Indians. Thus, when the United States claims an interest in real property based on its status as trust or restricted Indian lands, the Quiet Title Act does not waive the United States' immunity. But when an Indian plaintiff challenges the United States' assertion of title in its own behalf, the Act applies. The limitations period is a central condition of the consent given by the Act. By 1967, at the very latest, respondent was on notice that the Government did not recognize her title to the allotments in question; this satisfied the provision of the Quiet Title Act that for purposes of the 12-year limitations period that commences on the date upon which the action accrued, an action shall be deemed to have accrued on the date the plaintiff "should have known" of the United States' claim. Pp. 841–844.

(b) Respondent cannot avoid the Quiet Title Act limitations period by using the General Allotment Act for a quiet title action against the Government. The General Allotment Act grants federal district courts jurisdiction over suits seeking the issuance of an allotment and suits involving an Indian's interests and rights in his allotment after he has acquired it. The Act's structure suggests that it waives the Government's immunity only with respect to the former class of suits. That federal courts may have general subject-matter jurisdiction over claims to quiet title to allotments brought by Indians does not therefore mean that the United States has waived its immunity in cases where an Indian challenges the United States' claim of title in its own right. To permit suits against the United States under the General Allotment Act would not only permit plaintiffs to avoid the Quiet Title Act's 12-year limitations period but also could disrupt ongoing federal programs. Pp. 844–848.

(c) Respondent's action does not fall within the scope of the Tucker Act, and thus her appeal to the Court of Appeals was proper. Pp. 848–851.

753 F. 2d 71, reversed.

BLACKMUN, J., delivered the opinion for a unanimous Court.

Edwin S. Kneedler argued the cause for the United States. With him on the briefs were *Solicitor General Fried, Assistant Attorney General Habicht, Deputy Solicitor General Wallace,* and *David C. Shilton.*

Derck Amerman argued the cause for respondent. With him on the brief was *Leonard A. Zolna, Jr.**

**John C. Christie, Jr., J. William Hayton, Stephen J. Landes,* and *Lucinda O. McConathy* filed a brief for The American Land Title Association as *amicus curiae* urging reversal.

JUSTICE BLACKMUN delivered the opinion of the Court.

The question presented by this case is whether respondent's suit against the United States is time barred. In 1954, the Government sold respondent's interests in three Indian allotments to the United States Forest Service for inclusion in the Chippewa National Forest in Minnesota. Respondent claims that the sale was void. We hold that respondent's suit is an action "to adjudicate a disputed title to real property in which the United States claims an interest," within the meaning of the Quiet Title Act of 1972, 28 U. S. C. §2409a(a), and therefore is barred by that Act's 12-year period of limitations. See 28 U. S. C. §2409a(f).

I

In 1905, pursuant to the General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U. S. C. §331 *et seq.* (1982 ed. and Supp. II), and the Nelson Act of 1889, 25 Stat. 642, three Chippewa Indian ancestors of respondent Florence Blacketter Mottaz each received an 80-acre allotment on the Leech Lake Reservation in Cass County, Minn.[1] Title to each of these allotments was held in trust by the United States. Respondent eventually inherited a one-fifth interest in one of the allotments and a one-thirtieth interest in each of the other two.

In the early 1950's, some holders of fractional interests in Leech Lake allotments petitioned the Department of the Interior to permit them to sell their lands.[2] On April 30, 1953,

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Briefs of *amici curiae* urging affirmance were filed for the Navajo Tribe of Indians by *Paul E. Frye;* and for Katherine Nichols et al. by *Kim Jerome Gottschalk.*

[1] For a general discussion of the allotment program, see F. Cohen, Handbook of Federal Indian Law 612–632 (1982).

[2] By the Act of May 14, 1948, ch. 293, 62 Stat. 236, 25 U. S. C. §483, the Secretary of the Interior "is authorized in his discretion, and upon application of the Indians owners . . . to remove restrictions against alienation, and to approve conveyances, with respect to lands or interests in lands held by individual Indians."

the Department's Office of Indian Affairs sent respondent two forms, captioned "Consent to Sale of Inherited Lands." App. 42, 43.[3] Accompanying the forms was a letter which read in part:

> "As stated before, some of the owners have requested the sale of this land. Both land and timber, if any, have been appraised; and as soon as we get the consent to sell, an effort will be made to obtain a buyer by advertising for sale bids. This land will not be sold unless the high bid is equal to, or more than, the appraised value. If no reply is received from you within ten (10) days, it will be assumed that you have no objection to the sale." *Id.*, at 15.

The consent forms indicated that one of the allotments was appraised at $420.50 and the other at $605.75. Respondent neither replied to the letter nor returned the consent forms. In 1954, despite the lack of express consent from every person who held an interest in any of the three allotments, the Government sold them to the United States Forest Service.

Respondent visited the regional office of the Bureau of Indian Affairs in May 1967 and expressed an interest in selling her inherited Indian lands. Later that month, the realty officer sent her a letter informing her of her allotment interests. The letter did not mention the Leech Lake allotments. *Id.*, at 17. Respondent in 1981 again requested a list of her interests. In its reply, the Bureau set forth the allotments currently held in trust for her and, in addition, noted that she once had held interests in the Leech Lake allotments which had been sold by the Secretary as part of the so-called "Secretarial Transfer" program. *Id.*, at 44–45.[4]

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[3] No contemporaneous document concerning the third allotment appears in the record.

[4] In the late 1970's, the Bureau sought to identify potential land claims that might be affected by the statute of limitations set forth in 28 U. S. C. § 2415 (1982 ed. and Supp. II), which pertains, among other things, to certain contract and tort actions brought by the United States on behalf of

II

In 1981, respondent filed suit against the United States in the Federal District Court for the District of Minnesota. She claimed jurisdiction under 25 U. S. C. § 345, 28 U. S. C. §§ 1331, 1346, 1353, and 2415, and the Fifth Amendment. App. 7. She alleged that the sales of her three Leech Lake allotments "made without [her] consent or permission . . . were, therefore, illegal sales and transfers and are void." *Id.*, at 8. In addition, respondent raised four other claims regarding the sale: that the United States had breached its fiduciary duty in selling lands held in trust for her without first obtaining her consent; that the United States had acted negligently in selling her lands; that she had been deprived of property without due process; and that her property had been taken for public use without just compensation. *Id.*, at 10. Respondent also sought to represent both a nationwide and a Minnesota-based class of similarly situated Indian claimants. *Id.*, at 8–9.

Respondent originally sought either "[d]amages in a monetary sum equal to the current fair market value of each parcel illegally transferred" or "rescission of the illegal sale or transfer and the vesting of title of each individual parcel in the names of the appropriate descendants, heirs and assigns." *Id.*, at 10. After a preliminary hearing, she voluntarily dismissed, without prejudice, her claim requesting rescission. *Id.*, at 12.

The District Court ruled that respondent's claims were barred by 28 U. S. C. § 2401(a), the general statute of limitations governing actions against the United States. That sec-

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Indians. (In 1982, § 2415 was amended to apply, as well, to contract and tort claims brought by individual Indians and tribes.) The Bureau identified as "Secretarial transfers" those sales made without the consent of all the heirs. See H. R. Rep. No. 97–954, p. 7 (1982); see generally *County of Oneida* v. *Oneida Indian Nation*, 470 U. S. 226, 242–243 (1985) (discussing § 2415 claims).

tion provides, in pertinent part, that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." The court held that respondent's cause of action first accrued when she learned of the sale of the lands. Since respondent's deposition "clearly reveal[ed] that she had knowledge of the sale in 1954," App. to Pet. for Cert. 10a, her suit, filed 27 years after the sale, was barred.[5]

The Court of Appeals reversed and remanded. 753 F. 2d 71 (CA8 1985). While it recognized that respondent's complaint was somewhat opaque, it rejected the Government's claim that respondent was seeking, not simply to establish title to the allotments, but also to obtain damages for alleged negligence and breach of fiduciary duty: the complaint "must be read as raising the one essential claim that her land was sold without her consent, that she did not receive payment for her land, and that accordingly the sale was void and she retains title to the land." *Id.*, at 75. The claim for damages equal to the current fair market value of the land "must be construed as equivalent to a claim for return of the land itself." *Ibid.*

The Court of Appeals ruled that such a claim could not be time barred. This Court in *Ewert* v. *Bluejacket*, 259 U. S. 129 (1922), had held that the sale of an allotment to a Government agent in violation of federal law is "'void and confers no right upon the wrongdoer,'" *id.*, at 138, quoting *Waskey* v. *Hammer*, 223 U. S. 85, 94 (1912), and had refused to apply principles of laches to bar the Indians' claim against Ewert. Although *Ewert* v. *Bluejacket* did not consider whether federal statutes of limitations apply to land claims brought by Indian allottees, the Court of Appeals found that § 2401(a) "does not bar claims of title to allotments because *Ewert* is based on the principle that, if the underlying sale of land is void, the concept that a cause of action 'accrues' at some point is inapplicable because the allottee simply retains title all along." 753 F. 2d, at 74.

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[5] The District Court also rejected respondent's arguments that § 2401(a) does not apply to suits by Indians for breach of fiduciary duties, and that § 2415's special provisions dealing with Indian land claims override the general statute of limitations established by § 2401(a). With respect to the former claim, the court stated: "By its very terms 28 U. S. C. § 2401(a) applies to '*every civil action commenced against the United States*. . . .'" App. to Pet. for Cert. 10a (emphasis in District Court opinion). With respect to the latter claim, the court held that § 2415 "applies to actions brought *on behalf of* a recognized tribe or individual Indian" by the United States (emphasis in original). App. to Pet. for Cert. 10a. It does not, however, "permit claims *against* the United States." *Id.*, at 10a–11a (emphasis in original).

Thus, the Court of Appeals concluded that the statute of limitations question depended on the resolution of several preliminary issues. It therefore remanded the case to the District Court to determine whether the Secretary lacked the authority in 1954 to sell respondent's lands without her consent, and, if such a sale would have been unauthorized, whether respondent either had consented or had actually received payment following the sale, in which case her consent could be inferred. If respondent proved on remand that the sale was illegal, then, "[i]n light of the land's inclusion within the Chippewa National Forest and the thirty years which have passed since the sale, . . . she may force the government to pay her the fair market value of the land rather than to simply return the land itself." *Id.*, at 75.

The Government petitioned for rehearing and rehearing en banc. In its petition, the Government claimed, apparently for the first time, that respondent's suit to recover land currently held by the United States was barred, not by the general 6-year statute of limitations in § 2401(a), but rather by the 12-year limitations period established by the Quiet Title Act. 2 Record 16. In addition, the Government argued that the Court of Appeals' holding that respondent could compel the United States to pay her the fair market value of her property involved relief "of the type typically provided by the Tucker Act," *ibid.*, but a Tucker Act claim would clearly be barred by the 6-year statute of limitations. The Court of Appeals denied the Government's petition. App. to Pet. for Cert. 13a. Because of the importance of the issue, we granted certiorari to consider whether respondent's claim was barred under either § 2401(a) or § 2409a(f), the limitations provision governing Quiet Title Act claims. 474 U. S. 994 (1985).

III

When the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent of the court's jurisdiction. *United States* v. *Sherwood*, 312 U. S. 584, 586 (1941). In particular, "[w]hen waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity." *Block* v. *North Dakota*, 461 U. S. 273, 287 (1983). Neither the District Court nor the Court of Appeals discussed the precise source of its jurisdiction, and the parties at various times before this Court have identified the jurisdictional basis of respondent's suit as the Quiet Title Act, 28 U. S. C. §§ 1346(f) and 2409a; the Allotment Acts, 25 U. S. C. § 345 and 28 U. S. C. § 1353; and the Tucker Act, 28 U. S. C. § 1346(a)(2). Thus, we must decide which, if any, of these statutes conferred jurisdiction on the District Court and the Court of Appeals, and then determine whether respondent's suit was brought within the relevant limitations period.

A

In *Block* v. *North Dakota*, 461 U. S., at 286, this Court held that "Congress intended the QTA to provide the exclusive means by which adverse claimants could challenge the United States' title to real property." Here, respondent contests the United States' claim that it acquired title to the allotments in 1954. We think that respondent's suit falls within the scope of the Quiet Title Act, 28 U. S. C. § 2409a(a), which governs "civil action[s] . . . to adjudicate a disputed title to real property in which the United States claims an interest." Respondent's description of her claim clearly brings it within the Act's scope:

> "At no time in this proceeding did respondent drop her claim for title. To the contrary, the claim for title is the essence and bottom line of respondent's case. Her position is simply that the land remains in the name of Mottaz and the other heirs of the property despite what some pieces of paper executed by petitioner without her consent and without a court hearing purport to do." Brief for Respondent 3.

See also 753 F. 2d, at 74, 75. The relief respondent seeks confirms this characterization of her suit. Respondent does not seek recovery of her share of the proceeds realized by the United States from the 1954 sale but allegedly never distributed. A claim for monetary damages in that amount would involve a concession that title had passed to the United States Forest Service in 1954 and that the sole issue was whether respondent was fairly compensated for the taking of her interests in the allotments. Rather, respondent demands damages in the amount of the *current* fair market value of her interests. What respondent seeks is a declaration that she alone possesses valid title to her interests in the allotments and that the title asserted by the United States is defective, and an order requiring the United States to pay her the value of her interest today in order properly to transfer title.

Nonetheless, respondent claims that her suit is not governed by the Quiet Title Act because, by its own terms, that Act "does not apply to trust or restricted Indian lands," § 2409a(a), such as the lands in which she asserts an interest. Respondent misconstrues this exclusion, which operates solely to retain the United States' immunity from suit by third parties challenging the United States' title to land held in trust for Indians. See, *e. g.*, S. Rep. No. 92–575, p. 6 (1971); H. R. Rep. No. 92–1559, p. 13 (1972); Dispute of Titles on Public Lands, Hearing on S. 216, S. 579, and S. 721

before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs, 92d Cong., 1st Sess., 19 (1971). Thus, when the United States claims an interest in real property based on that property's status as trust or restricted Indian lands, the Quiet Title Act does not waive the Government's immunity.[6] Here, however, the United States claims an interest in the Leech Lake lands, not on behalf of Indian beneficiaries of a trust, but rather on behalf of the United States Forest Service and the Chippewa National Forest. Thus, the Act provides the United States' consent to suit concerning its claim to these lands, provided, of course, that the plaintiff challenging the Government's title meets the conditions attached to the United States' waiver of immunity.

The limitations period is a central condition of the consent given by the Act. See, *e. g., Block,* 461 U. S., at 283–285; H. R. Rep. No. 92–1559, *supra,* at 5, 7–8. The Act provides:

> "Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it is accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." 28 U. S. C. § 2409a(f).

The District Court expressly found that respondent knew of the sale in 1954. Moreover, the list of interests provided to respondent by the Bureau of Indian Affairs in 1967 did not include any of the three Leech Lake allotments. Thus, by

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[6] In urging that such an exemption be included in the Quiet Title Act, the Solicitor for the Department of the Interior noted that excluding suits against the United States seeking title to lands held by the United States in trust for Indians was necessary to prevent abridgment of "solemn obligations" and "specific commitments" that the Federal Government had made to the Indians regarding Indian lands. A unilateral waiver of the Federal Government's immunity would subject those lands to suit without the Indians' consent. See H. R. Rep. No. 92–1559, p. 13 (1972).

1967, at the very latest, respondent was on notice that the Government did not recognize her title to the allotments. Whether respondent actually knew that the allotments had been included within the Chippewa National Forest and thus were claimed by the United States, her undisputed knowledge that the Government no longer recognized *her* as having a valid claim to the allotments satisfies the "should have known" prong of § 2409a(f)'s accrual test.[7] Her claim is therefore barred.

B

Respondent, however, seeks to avoid the carefully crafted limitations of the Quiet Title Act by characterizing her suit as a claim for an allotment under the General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U. S. C. § 331 *et seq.* (1982 ed. and Supp. II). That Act grants jurisdiction to the district courts over suits "involving the right . . . to any allotment." 25 U. S. C. § 345.[8] Respondent claims that the

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[7] Our finding that respondent's cause of action accrued more than 12 years prior to her filing suit does *not* rest on the fact that the letter sent by the Government in 1953 informed respondent that the failure to reply within 10 days would be deemed a consent to the sale. That letter expressly noted that the land would be sold only if a bid of at least its appraised value were received. App. 15. It therefore was entirely possible that no sale would occur even if respondent expressly had consented to the sale. Respondent's cause of action accrued only because she in fact knew that a sale had been completed and knew, or should have known, that the Government was the purchaser.

[8] Title 25 U. S. C. § 345 reads in full:

"All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment general 6-year statute of limitations governing all civil actions against the Government, 28 U. S. C. § 2401(a), does not apply to cases brought under the General Allotment Act, and that her claim therefore cannot be time barred. We need not reach the question whether § 2401(a) applies to claims brought under § 345 of the General Allotment Act, and, if it does, when a cause of action begins to run, since we conclude that respondent cannot use § 345 for a quiet title action against the Government.

Section 345 grants federal district courts jurisdiction over two types of cases: (i) proceedings "involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty," and (ii) proceedings "in relation to" the claimed right of a person of Indian descent to land that was once allotted. Section 345 thus contemplates two types of suits involving allotments: suits seeking the issuance of an allotment, see, *e. g.*, *Arenas* v. *United States*, 322 U. S. 419 (1944), and suits involving "'the interests and rights of the Indian in his allotment or patent after he has acquired it,'" *Scholder* v. *United States*, 428 F. 2d 1123, 1129 (CA9), cert. denied, 400 U. S. 942 (1970), quoting *United States* v. *Pierce*, 235 F. 2d 885, 889 (CA9 1956).

The structure of § 345 strongly suggests, however, that § 345 itself waives the Government's immunity only with respect to the former class of cases: those seeking an original

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of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands now held by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: *Provided*, That the right of appeal shall be allowed to either party as in other cases."

A corresponding provision governing district court jurisdiction appears in 28 U. S. C. § 1353. Respondent invoked jurisdiction under both § 345 and § 1353 in her complaint. App. 7.

allotment. In those suits, § 345 provides that "the parties thereto *shall be* the claimant as plaintiff and the United States as party defendant" (emphasis added), while, as to the latter class of cases, no mention of the United States' participation is made.[9] Accordingly, in *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128 (1972), this Court held that, to the extent that § 345 involves a waiver of federal immunity, as opposed to a grant of subject-matter jurisdiction to the district courts, that section "authorizes, and provides governmental consent for, only actions *for* allotments." 406 U. S., at 142 (emphasis added). See also *Naganab* v. *Hitchcock*, 202 U. S. 473 (1906) (sovereign immunity precludes suit against United States regarding disposition of Indian lands).

That federal courts may have general subject-matter jurisdiction over claims to quiet title to allotments brought by Indians, see n. 9, *supra*, does not therefore mean that the United States has waived its immunity in cases where an Indian challenges the United States' claim of title in its own right. As the Court already has noted, Congress intended the Quiet Title Act "to provide the exclusive means by which adverse claimants [can] challenge the United States' title to real property." *Block*, 461 U. S., at 286. In *Block*, the State of North Dakota sued the federal officers responsible for supervising a riverbed within the State which both the State and the Federal Government claimed to own and sought an injunction barring them from exercising privileges of ownership over the bed. The Court held that such an "officer's suit" was precluded since it would circumvent the "carefully crafted provisions of the QTA deemed necessary for the protection of the national public interest." *Id.*, at 284–285. To permit challenges to the Government's claim of title to be brought under other jurisdictional provisions might mean that "the QTA's 12-year statute of limitations, the one point on which the Executive Branch was most insistent, could be avoided, and, contrary to the wish of Congress, an unlimited number of suits involving stale claims might be instituted." *Id.*, at 285. Moreover, to permit officer's suits might thwart Congress' determination that the Government be given the option of paying just compensation and thereby keeping land even after an adverse judgment, see § 2409a(b), in order to avoid disruption of ongoing federal activities involving the disputed property. 461 U. S., at 285.

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[9] In fact, § 345 has been used by Indians to sue parties other than the United States to quiet title to land originally given under various allotment schemes. See, *e. g.*, *Begay* v. *Albers*, 721 F. 2d 1274 (CA10 1983); *Vicenti* v. *United States*, 470 F. 2d 845 (CA10 1972), cert. dism'd, 414 U. S. 1057 (1973) (plaintiffs sought recovery of title from private parties; suit against the United States for damages held barred by sovereign immunity). To hold that in *all* cases brought under § 345 the United States must be named as a party defendant would restrict the access to federal courts afforded Indians raising claims or defenses involving their land entitlements because the United States would obviously not be a proper party in many private disputes that relate to land claims originally granted by various Allotment Acts.

To permit suits against the United States under the General Allotment Act poses similar dangers. Not only could it permit plaintiffs to avoid the Quiet Title Act's 12-year statute of limitations, but it could also seriously disrupt ongoing federal programs. The remedial clause of the General Allotment Act provides that a judgment in favor of an Indian claimant "shall have the same effect . . . as if such allotment had been allowed and approved by [the Secretary of the Interior]." 25 U. S. C. § 345. Thus, if plaintiffs were permitted to sue under the General Allotment Act, they would be entitled to actual possession of the challenged property. This would pose precisely the threat to ongoing federal activities on the property that the Quiet Title Act was intended to avoid. That the plaintiff in this case claims the right to elect a remedy that would not require the Government to relinquish its possession of the disputed lands is irrelevant: the Quiet Title Act expressly gives that choice to the Government, not the claimant. 28 U. S. C. § 2409a(b). In light of Congress' purposes in enacting the Quiet Title Act, we cannot conclude that Congress intended to permit persons in respondent's position to avoid that Act's strictures.[10]

C

At oral argument, respondent claimed that her case is based solely on the General Allotment Act. See Tr. of Oral Arg. 23, 26. Nevertheless, at various times during this litigation, both parties have identified the Tucker Act as providing a source of federal jurisdiction over respondent's claims. Although respondent and the Government apparently agree that a suit based on the Tucker Act would be barred by the general 6-year statute of limitations, 28 U. S. C. § 2401(a), we must address the possibility that the District Court's jurisdiction rested on the Tucker Act because, if it did, the Court of Appeals for the Eighth Circuit may have lacked jurisdiction over respondent's appeal.[11]

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[10] The Indian Claims Limitation Act of 1982, 96 Stat. 1976, which amended 28 U. S. C. § 2415(a), essentially tolls—for a time—the general 6-year statute of limitations for many damages actions that may be brought *by* the Federal Government on behalf of Indians. Respondent claims that § 2415 also shows that Congress did not intend the general 6-year statute of limitations for damages actions brought *against* the Federal Government, 28 U. S. C. § 2401, to apply to her claim. But § 2415 is expressly inapplicable to actions "to establish the title to, or right of possession of, real or personal property." 28 U. S. C. § 2415(c). In *County of Oneida* v. *Oneida Indian Nation*, 470 U. S., at 240–241, the Court concluded that Indian land claims not subject to any federal limitations period were presumptively exempt from state statutes of limitations as well. Respondent's claim, however, is based on a particular federal statute—the Quiet Title Act—that contains its own limitations period.

[11] Under 28 U. S. C. § 1295(a)(2), the Court of Appeals for the Federal Circuit possesses exclusive jurisdiction over an appeal from a district court's decision

> "if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title, except that jurisdiction of an appeal in a case brought in a district court under section 1346(a)(1), 1346(b), 1346(e), or 1346(f) of this title or under section 1346(a)(2) when the claim is founded upon an Act of Congress or a regulation of an executive department providing for internal

Prior to the passage of the Quiet Title Act, adverse claimants had resorted to the Tucker Act to circumvent the Government's immunity from quiet title suits. Rather than seeking a declaration that they owned the property at issue, such claimants would concede that the Government possessed title and then would seek compensation for the Government's having taken the property from them. See *Block*, 461 U. S., at 280–281; H. R. Rep. No. 92–1559, at 9, 12. In

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revenue shall be governed by sections 1291, 1292, and 1294 of this title [the provisions granting jurisdiction to the regional courts of appeals]."

Thus, if the District Court's jurisdiction here depended on the Tucker Act, § 1346(a)(2), then the Eighth Circuit lacked jurisdiction over respondent's appeal, and we would have to vacate its judgment and remand the case with directions to transfer the appeal pursuant to 28 U. S. C. § 1631 to the Federal Circuit. See, *e. g.*, *Ballam* v. *United States*, 474 U. S. 898 (1986); *Pacyna* v. *Marsh*, 474 U. S. 1078 (1986).

In light of our conclusion that the District Court's jurisdiction was not based on the Tucker Act, but instead rested on § 1346(f) (Quiet Title Act claims), we need not reach the difficult and unsettled question of how an appeal raising both issues committed to the Federal Circuit's jurisdiction and issues outside its jurisdiction is to be treated. See, *e. g.*, S. Rep. No. 97–275, pp. 19–20 (1981); H. R. Rep. No. 97–312, p. 41 (1981); Court of Appeals for the Federal Circuit—1981, Hearings on H. R. 2405 before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 97th Cong., 1st Sess., 90 (1981) (testimony of James W. Geriak); Cihlar & Goldstein, A Dialogue About the Potential Issues in the Patent Jurisdiction of the Court of Appeals for the Federal Circuit, 10 APLA Q. J. 284 (1982); Drabiak, Jurisdiction of the New Court of Appeals for the Federal Circuit, 73 Ill. B. J. 218 (1984); Newman, Tails and Dogs: Patent and Antitrust Appeals in the Court of Appeals for the Federal Circuit, 10 APLA Q. J. 237 (1982) (all discussing the issue in the context of patent appeals that also raise antitrust claims).

In particular, we express no opinion on the question whether, since § 1295(a)(2) explicitly disclaims Federal Circuit jurisdiction over claims based on § 1346(f), and the Federal Circuit is a court of limited jurisdiction, see H. R. Rep. No. 97–312, *supra*, at 39, an appeal in a case raising both Tucker Act and Quiet Title Act claims would have to be bifurcated and sent in part to the regional circuit and in part to the Federal Circuit. Cf. S. Rep. No. 97–275, *supra*, at 20.

light of the Quiet Title Act's explicit statement that § 2409a(a) does not "apply to or affect actions which may be or could have been brought under sections 1346 . . . [or] 1491 . . . of this title,"[12] we cannot conclude that Tucker Act-based suits, like the officer's suit at issue in *Block*, are clearly precluded by the passage of the Quiet Title Act.

But regardless of whether other claimants may invoke the district courts' Tucker Act jurisdiction to hear their claims, it is clear that respondent has not brought a case falling within the scope of the Tucker Act. In *Healy* v. *Sea Gull Specialty Co.*, 237 U. S. 479, 480 (1915), Justice Holmes, writing for a unanimous Court, stated that "the plaintiff is absolute master of what jurisdiction he will appeal to," and noted that "[j]urisdiction generally depends upon the case made and relief demanded by the plaintiff." Thus, since the "essential features," *id.*, at 481, of Healy's case involved allegations of patent infringement and a request for the relief characteristically provided by patent law, Healy could invoke federal patent law jurisdiction despite the fact that the measure of damages was fixed by contract.

Respondent now invokes federal jurisdiction only under the General Allocation Act and its jurisdictional counterpart. Moreover, the case she has made, and the relief she seeks, do not fit within the scope of the Tucker Act. A Tucker Act-based lands suit would seek damages equal to just compensation for an already completed taking of the claimant's land. See, *e. g.*, *Block*, 461 U. S., at 280–281; H. R. Rep. No. 92–1559, at 7, 9, 12–13. As we have noted, however, respondent is not seeking whatever compensation she allegedly was denied in 1954. Rather, she claims she still owns her interests in the allotments, and she seeks to force the Government to buy those interests. She claims, in essence, that no legally cognizable taking has yet occurred. See Brief for Respondent 3–4. Respondent and the Court of Appeals view payment rather than return of the land as an appropriate remedy because respondent's allotments now lie within the Chippewa National Forest. But neither views this payment as representing damages for the Government's past acts, the essence of a Tucker Act claim for monetary relief. See, *e. g.*, *United States* v. *Mitchell*, 463 U. S. 206 (1983). Since this Indian respondent's claim was not based on the Tucker Act, her appeal to the Court of Appeals for the Eighth Circuit was proper.

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[12] The broad reference to "sectio[n] 1346" is somewhat opaque. Section 1346(f), in fact, grants the district courts "exclusive original jurisdiction of civil actions under section 2409a." The exclusion in § 2409a therefore cannot be read to include all suits that can be brought under § 1346. We think, however, that the exclusion of suits brought under § 1491—the Tucker Act provision granting the Claims Court jurisdiction—supports finding a similar exclusion of suits brought under § 1346(a)(2)—the analogous district court provision.

IV

Federal law rightly provides Indians with a range of special protections. But even for Indian plaintiffs, "[a] waiver of sovereign immunity 'cannot be lightly implied but must be unequivocally expressed.'" *United States* v. *Mitchell*, 445 U. S. 535, 538 (1980), quoting *United States* v. *King*, 395 U. S. 1, 4 (1969). Congress has consented to a suit challenging the Federal Government's title to real property only if the action is brought within the 12-year period set by the Quiet Title Act. The limitations provision of the Quiet Title Act reflects a clear congressional judgment that the national public interest requires barring stale challenges to the United States' claim to real property, whatever the merits of those challenges. Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered.

REED *v.* CAMPBELL, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF RICKER

APPEAL FROM THE COURT OF APPEALS OF TEXAS, EIGHTH SUPREME JUDICIAL DISTRICT

No. 85-755. Argued April 30, 1986—Decided June 11, 1986

Appellant's father died intestate at a time when § 42 of the Texas Probate Code prohibited an illegitimate child from inheriting from its father unless its parents had subsequently married. *Trimble* v. *Gordon,* 430 U. S. 762, decided four months after the father's death, held that a total statutory disinheritance, from the paternal estate, of children born out of wedlock and not legitimated by the subsequent marriage of their parents, is unconstitutional. Thereafter, appellant filed a claim to a share in her father's estate, but it was denied by a Texas trial court. The Texas Court of Appeals affirmed, holding that *Trimble* does not apply retroactively.

Held: The interest, protected by the Fourteenth Amendment, in avoiding unjustified discrimination against children born out of wedlock, requires that appellant's claim to a share in her father's estate be protected by the full applicability of *Trimble.* There is no justification for the State's rejection of the claim. At the time appellant filed her claim, *Trimble* had been decided, and her father's estate remained open. Neither the date of the father's death nor the date appellant's claim was filed should have prevented the applicability of *Trimble.* Those dates, either separately or in combination, had no impact on the State's interest in orderly administration of the estate. Pp. 854-857.

682 S. W. 2d 697, reversed and remanded.

STEVENS, J., delivered the opinion for a unanimous Court.

R. Stephen McNally argued the cause and filed briefs for appellant.

Paul McCollum argued the cause for appellee. With him on the brief were *Kathleen M. McCulloch* and *Fletcher N. Baldwin, Jr.*

JUSTICE STEVENS delivered the opinion of the Court.

Prince Ricker, appellant's father, died intestate on December 22, 1976. At that time, § 38 of the Texas Probate Code provided that a decedent's estate should descend to "his children and their descendants,"[1] but § 42 prohibited an illegitimate child from inheriting from her father unless her parents had subsequently married.[2] In *Trimble* v. *Gordon*, 430 U. S. 762 (1977)—decided four months after Ricker's death—we held that a total statutory disinheritance, from the paternal estate, of children born out of wedlock and not legitimated by the subsequent marriage of their parents is unconstitutional. In this case, the Texas Court of Appeals held that § 42 of the Texas Probate Code nevertheless prevented appellant from sharing in her father's estate because *Trimble* does not apply retroactively.[3] The Texas Supreme Court refused appellant's application of error, noting "no reversible error." We noted probable jurisdiction, 474 U. S. 1018 (1985), and now reverse.

I

Only a few facts need be stated. In November 1957, Prince Ricker and appellant's mother participated in a ceremonial marriage, but it was invalid because Ricker's divorce from his first wife was not final. Appellant was born a year later. Ricker was lawfully married three times, once before and twice after his liaison with appellant's mother. He was survived by five legitimate children (two from his first and three from his third marriage) and by appellant.

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[1] See Tex. Prob. Code Ann. § 38(a) (Vernon 1980) ("Where any person having title to any estate, . . . shall die intestate, leaving no husband or wife, it shall descend and pass in parcenary to his kindred, male and female, in the following course: 1. To his children and their descendants . . .").

[2] See Tex. Prob. Code Ann. § 42 (Vernon 1956) ("For the purpose of inheritance to, through, and from an illegitimate child, such child shall be treated the same as if he were the legitimate child of his mother, so that he and his issue shall inherit *from his mother and from his maternal kindred*, both descendants, ascendants, and collaterals in all degrees, and they may inherit from him") (emphasis added).

[3] "Under the rule of *Winn* v. *Lackey*, [618 S. W. 2d 910 (Tex. Civ. App. 1981)] and the out-of-state cases cited therein, the equal protection argument fails as *Trimble* v. *Gordon*, 430 U. S. 762 . . . (1977), has not been applied retroactively where the father died before the case came down and suit was filed afterwards." 682 S. W. 2d 697, 700 (Tex. App. 1984).

Shortly after Ricker's death in 1976, his oldest daughter was appointed administratrix of his estate. The estate was still open in February 1978, when appellant formally notified the administratrix and the Probate Court of her claim to a one-sixth share of the estate. In due course, she filed a formal complaint; a jury found that Ricker was her father but the trial court concluded that he was never validly married to her mother and denied her claim.

In the Court of Appeals, appellant contended that she was entitled to inherit even if she was illegitimate because § 42 was unconstitutional, and also that she was entitled to be legitimated on various theories. The appellate court rejected all her arguments.[4]

II

Although the question presented in this case is framed in terms of "retroactivity," its answer is governed by a rather clear distinction that has emerged from our cases considering the constitutionality of statutory provisions that impose special burdens on illegitimate children. In these cases, we have unambiguously concluded that a State may not justify discriminatory treatment of illegitimates in order to express its disapproval of their parents' misconduct.[5] We have, however, also recognized that there is a permissible basis for some "distinctions made in part on the basis of legitimacy";[6] specifically, we have upheld statutory provisions that have an evident and substantial relation to the State's interest in providing for the orderly and just distribution of a decedent's property at death. *Lalli* v. *Lalli*, 439 U. S. 259 (1978).[7]

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[4] In her jurisdictional statement, appellant raised several questions that relate to the legitimation issue. Because we hold that she is entitled to relief on her principal claim, and because the legitimation questions appear not to have been properly presented as federal questions, see appellant's brief before the Texas Court of Appeals (presenting only the *Trimble* question as a federal constitutional issue), we do not reach the legitimation issue.

[5] "It is true, of course, that the legal status of illegitimacy, however defined, is, like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual, and it bears no relation to the individual's ability to participate in and contribute to society. The Court recognized in *Weber* [v. *Aetna Casualty & Surety Co.*, 406 U. S. 164

The state interest in the orderly disposition of decedents' estates may justify the imposition of special requirements upon an illegitimate child who asserts a right to inherit from her father, and, of course, it justifies the enforcement of generally applicable limitations on the time and the manner in which claims may be asserted. After an estate has been finally distributed, the interest in finality may provide an additional, valid justification for barring the belated assertion of claims, even though they may be meritorious and even though mistakes of law or fact may have occurred during the

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(1972)] that visiting condemnation upon the child in order to express society's disapproval of the parents' liaisons

"'is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.' 406 U. S., at 175. (Footnote omitted.)" *Mathews* v. *Lucas*, 427 U. S. 495, 505 (1976).

[6] *Ibid.*

[7] "The presence in this case of the State's interest in the orderly disposition of a decedent's property at death distinguishes it from others in which that justification for an illegitimacy-based classification was absent. *E. g., Jimenez* v. *Weinberger*, 417 U. S. 628 (1974); *Gomez* v. *Perez*, 409 U. S. 535 (1973); *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164, 170 (1972); *Levy* v. *Louisiana*, 391 U. S. 68 (1968)." 439 U. S., at 268, n. 6 (opinion of POWELL, J.).

Although the dissenters did not believe the state interest was sufficient to support the particular statute before the Court in that case, they agreed with the basic proposition that this state interest may justify some differential treatment—"New York might require illegitimates to prove paternity by an elevated standard of proof," *id.*, at 279 (BRENNAN, J., dissenting).

probate process. We find no such justification for the State's rejection of appellant's claim in this case.

The Texas courts have relied on *Trimble* v. *Gordon*, 430 U. S. 762 (1977), as a basis for holding § 42 invalid in cases that were pending on April 26, 1977—the date *Trimble* was decided. See *Winn* v. *Lackey*, 618 S. W. 2d 910 (Tex. Civ. App. 1981); *Lovejoy* v. *Lillie*, 569 S. W. 2d 501 (Texas Civ. App. 1978). Although the administration of Prince Ricker's estate was in progress on that date, the court refused to apply *Trimble* because appellant's claim was not asserted until later. Thus, the test applied by the Texas court resulted in the denial of appellant's claim because of the conjunction of two facts: (1) her father died before April 26, 1977, and (2) her claim was filed after April 26, 1977.

There is nothing in the record to explain why these two facts, either separately or in combination, should have prevented the applicability of *Trimble*, and the allowance of appellant's claim, at the time when the trial court was required to make a decision. At that time, the governing law had been established: *Trimble* had been decided, and it was clear that § 42 was invalid. The state interest in the orderly administration of Prince Ricker's estate would have been served equally well regardless of how the merits of the claim were resolved. In this case, then, neither the date of his death nor the date the claim was filed had any impact on the relevant state interest in orderly administration; their conjunction similarly had no impact on that state interest.

The interest in equal treatment protected by the Fourteenth Amendment to the Constitution—more specifically, the interest in avoiding unjustified discrimination against children born out of wedlock, see *Mathews* v. *Lucas*, 427 U. S. 495, 505 (1976)—should therefore have been given controlling effect. That interest requires that appellant's claim to a share in her father's estate be protected by the full applicability of *Trimble* to her claim.[8]

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[8] In addition to concluding that *Trimble* did not apply, the Texas Court of Appeals stated that "[e]ven if the plaintiff could claim under section 42(b)

The judgment of the Texas Court of Appeals is therefore reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

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as amended, her exclusion from the inheritance under that statute does not deny her constitutional equal protection since a rational state basis supports that legislation." 682 S. W. 2d, at 700. We read that statement, not as an alternative ground for the court's judgment, but as the rejection of an alternative ground for appellant's recovery. To read it as assuming that the amended statute defeated appellant's claim, even if *Trimble* applied, would, in the context of this case and the amended statute's requirements, raise serious due process questions.

EAST RIVER STEAMSHIP CORP. ET AL. *v.* TRANSAMERICA DELAVAL INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84-1726. Argued January 21, 1986—Decided June 16, 1986

A shipbuilder contracted with respondent to design, manufacture, and supervise the installation of turbines that would be the main propulsion units for four oil-transporting supertankers constructed by the shipbuilder. After each ship was completed, it was chartered to one of the petitioners. When the ships were put into service, the turbines on all four ships malfunctioned due to design and manufacturing defects. Only the products themselves were damaged. Petitioners filed a five-count admiralty complaint in Federal District Court against respondent, alleging tortious conduct based on a products-liability theory and seeking damages for the cost of repairing the ships and for income lost while they were out of service. The District Court granted summary judgment for respondent. The Court of Appeals affirmed, holding that petitioners' dissatisfaction with product quality did not state a claim cognizable in tort.

Held:

1. The fourth count should have been dismissed on the ground that the petitioner who chartered the ship referred to in that count lacked standing to bring the claim. P. 863.

2. The torts alleged in the other counts clearly fall within admiralty jurisdiction. Pp. 863-864.

3. Admiralty law, which already recognizes a general theory of liability for negligence, also incorporates principles of products liability, including strict liability. Pp. 864-866.

4. But whether stated in negligence or strict liability, no products-liability claim lies in admiralty when a commercial party alleges injury only to the product itself resulting in purely economic loss. Such a claim is most naturally understood as a warranty claim. Pp. 866-876.

752 F. 2d 903, affirmed.

BLACKMUN, J., delivered the opinion for a unanimous Court.

Thomas E. Durkin, Jr., argued the cause for petitioners. With him on the briefs were *Clarkson S. Fisher, Jr.*, and *George J. Koelzer*.

Robert E. Smith, argued the cause for respondent. With him on the brief were *Norman L. Greene, Barry M. Okun, Maria Echaveste,* and *Waldron Kraemer.**

JUSTICE BLACKMUN delivered the opinion of the Court.

In this admiralty case, we must decide whether a cause of action in tort is stated when a defective product purchased in a commercial transaction malfunctions, injuring only the product itself and causing purely economic loss. The case requires us to consider preliminarily whether admiralty law, which already recognizes a general theory of liability for negligence, also incorporates principles of products liability, including strict liability. Then, charting a course between products liability and contract law, we must determine whether injury to a product itself is the kind of harm that should be protected by products liability or left entirely to the law of contracts.

I

In 1969, Seatrain Shipbuilding Corp. (Shipbuilding), a wholly owned subsidiary of Seatrain Lines, Inc. (Seatrain), announced it would build the four oil-transporting supertankers in issue—the T. T. *Stuyvesant,* T. T. *Williamsburgh,* T. T. *Brooklyn,* and T. T. *Bay Ridge.* Each tanker was constructed pursuant to a contract in which a separate wholly owned subsidiary of Seatrain engaged Shipbuilding. Shipbuilding in turn contracted with respondent, now known as Transamerica Delaval Inc. (Delaval), to design, manufacture, and supervise the installation of turbines (costing $1.4 million each, see App. 163) that would be the main propulsion units for the 225,000-ton, $125 million, *ibid.,* supertankers. When each ship was completed, its title was transferred from the contracting subsidiary to a trust company (as trustee for

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*Briefs of *amici curiae* urging affirmance were filed for Pott Industries, Inc., by *W. Stanley Walch* and *James W. Erwin;* and for the Product Liability Advisory Council, Inc., et al. by *Herbert Rubin, Michael Hoenig, David B. Hamm, William H. Crabtree,* and *Edward P. Good.*

an owner), which in turn chartered the ship to one of the petitioners, also subsidiaries of Seatrain. Queensway Tankers, Inc., chartered the *Stuyvesant;* Kingsway Tankers, Inc., chartered the *Williamsburgh;* East River Steamship Corp. chartered the *Brooklyn;* and Richmond Tankers, Inc., chartered the *Bay Ridge.* Each petitioner operated under a bareboat charter, by which it took full control of the ship for 20 or 22 years as though it owned it, with the obligation afterwards to return the ship to the real owner. See G. Gilmore & C. Black, Admiralty §§4–1, 4–22 (2d ed. 1975). Each charterer assumed responsibility for the cost of any repairs to the ships. Tr. of Oral Arg. 11, 16–17, 35.

The *Stuyvesant* sailed on its maiden voyage in late July 1977. On December 11 of that year, as the ship was about to enter the Port of Valdez, Alaska, steam began to escape from the casing of the high-pressure turbine. That problem was temporarily resolved by repairs, but before long, while the ship was encountering a severe storm in the Gulf of Alaska, the high-pressure turbine malfunctioned. The ship, though lacking its normal power, was able to continue on its journey to Panama and then San Francisco. In January 1978, an examination of the high-pressure turbine revealed that the first-stage steam reversing ring virtually had disintegrated and had caused additional damage to other parts of the turbine. The damaged part was replaced with a part from the *Bay Ridge,* which was then under construction. In April 1978, the ship again was repaired, this time with a part from the *Brooklyn.* Finally, in August, the ship was permanently and satisfactorily repaired with a ring newly designed and manufactured by Delaval.

The *Brooklyn* and the *Williamsburgh* were put into service in late 1973 and late 1974, respectively. In 1978, as a result of the *Stuyvesant's* problems, they were inspected while in port. Those inspections revealed similar turbine damage. Temporary repairs were made, and newly designed parts were installed as permanent repairs that summer.

When the *Bay Ridge* was completed in early 1979, it contained the newly designed parts and thus never experienced the high-pressure turbine problems that plagued the other three ships. Nonetheless, the complaint appears to claim damages as a result of deterioration of the *Bay Ridge*'s ring that was installed in the *Stuyvesant* while the *Bay Ridge* was under construction. In addition, the *Bay Ridge* experienced a unique problem. In 1980, when the ship was on its maiden voyage, the engine began to vibrate with a frequency that increased even after speed was reduced. It turned out that the astern guardian valve, located between the high-pressure and low-pressure turbines, had been installed backwards. Because of that error, steam entered the low-pressure turbine and damaged it. After repairs, the *Bay Ridge* resumed its travels.

II

The charterers' second amended complaint, filed in the United States District Court for the District of New Jersey, invokes admiralty jurisdiction. It contains five counts alleging tortious conduct on the part of respondent Delaval and seeks an aggregate of more than $8 million in damages for the cost of repairing the ships and for income lost while the ships were out of service. The first four counts, read liberally, allege that Delaval is strictly liable for the design defects in the high-pressure turbines of the *Stuyvesant*, the *Williamsburgh*, the *Brooklyn*, and the *Bay Ridge*, respectively. The fifth count alleges that Delaval, as part of the manufacturing process, negligently supervised the installation of the astern guardian valve on the *Bay Ridge*. The initial complaint also had listed Seatrain and Shipbuilding as plaintiffs and had alleged breach of contract and warranty as well as tort claims. But after Delaval interposed a statute of limitations defense, the complaint was amended and the charterers alone brought the suit in tort. The nonrenewed claims were dismissed with prejudice by the District Court. Delaval then moved for summary judgment, contending that the charterers' actions were not cognizable in tort.

The District Court granted summary judgment for Delaval, and the Court of Appeals for the Third Circuit, sitting en banc, affirmed. *East River S.S. Corp.* v. *Delaval Turbine, Inc.*, 752 F. 2d 903 (1985). The Court of Appeals held that damage solely to a defective product is actionable in tort if the defect creates an unreasonable risk of harm to persons or property other than the product itself, and harm materializes. Disappointments over the product's quality, on the other hand, are protected by warranty law. *Id.*, at 908, 909–910. The charterers were dissatisfied with product quality: the defects involved gradual and unnoticed deterioration of the turbines' component parts, and the only risk created was that the turbines would operate at a lower capacity. *Id.*, at 909. See *Pennsylvania Glass Sand Corp.* v. *Caterpillar Tractor Co.*, 652 F. 2d 1165, 1169–1170 (CA3 1981). Therefore, neither the negligence claim nor the strict-liability claim was cognizable.

Judge Garth concurred on "grounds somewhat different," 752 F. 2d, at 910, and Judge Becker, joined by Judge Higginbotham, concurred in part and dissented in part. *Id.*, at 913. Although Judge Garth agreed with the majority's analysis on the merits, he found no strict-liability claim presented because the charterers had failed to allege unreasonable danger or demonstrable injury.

Judge Becker largely agreed with the majority's approach, but would permit recovery for a "near miss," where the risk existed but no calamity occurred. He felt that the first count, concerning the *Stuyvesant*, stated a cause of action in tort. The exposure of the ship to a severe storm when the ship was unable to operate at full power due to the defective part created an unreasonable risk of harm.

We granted certiorari to resolve a conflict among the Courts of Appeals sitting in admiralty.[1] 474 U. S. 814 (1985).

III

A

Initially, we conclude that the fourth count should have been dismissed because Richmond Tankers, Inc., the charterer of the *Bay Ridge*, lacks standing to bring a claim relating to the defective ring that was removed from the *Bay Ridge* when it was still under construction. The ring was installed in the *Stuyvesant* where it remained until April 1978, when it was removed due to disintegration. Richmond did not charter the *Bay Ridge* until May 1979, after the ship was completed with a newly designed, nondefective, high-pressure turbine. See Plaintiffs' Answers to First Set of Interrogatories of Defendants, No. 42. Richmond therefore can allege no cognizable injury. *Warth* v. *Seldin*, 422 U. S. 490, 501 (1975). Richmond, of course, has standing to bring the claim raised in the fifth count, as the damage from the reverse installation of the astern guardian valve allegedly occurred after Richmond chartered the *Bay Ridge*.

B

The torts alleged in the first, second, third, and fifth counts clearly fall within the admiralty jurisdiction. The claims satisfy the traditional "locality" requirement—that the wrong must have occurred on the high seas or navigable waters. See, *e. g., The Plymouth*, 3 Wall. 20, 35–36 (1866). The first and fifth counts allege that the injury to the *Stuyvesant*'s high-pressure turbine and the *Bay Ridge*'s low-pressure turbine occurred while the ships were sailing on the high seas. The damage to the *Williamsburgh* and the *Brooklyn*, alleged in the second and third counts, occurred at sea, and was discovered in port, also a maritime locale. See *Southern S.S. Co.* v. *NLRB*, 316 U. S. 31, 41 (1942).

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[1] Compare *East River S.S. Corp.* v. *Delaval Turbine, Inc.*, 752 F. 2d 903 (CA3 1985) (en banc) (this case), with *Ingram River Equipment, Inc.* v. *Pott Industries, Inc.*, 756 F. 2d 649 (CA8 1985), cert. pending, No. 85–12; *Miller Industries* v. *Caterpillar Tractor Co.*, 733 F. 2d 813 (CA11 1984); *Emerson G. M. Diesel, Inc.* v. *Alaskan Enterprise*, 732 F. 2d 1468 (CA9 1984). See also *Pan-Alaska Fisheries, Inc.* v. *Marine Constr. & Design Co.*, 565 F. 2d 1129 (CA9 1977); and *Jig The Third Corp.* v. *Puritan Marine Ins. Underwriters Corp.*, 519 F. 2d 171 (CA5 1975). Cf. *Louisiana ex rel. Guste* v. *M/V Testbank*, 752 F. 2d 1019 (CA5 1985) (en banc), cert. pending *sub nom. White* v. *M/V Testbank*, No. 84–1808.

When torts have occurred on navigable waters within the United States, the Court has imposed an additional requirement of a "maritime nexus"—that the wrong must bear "a significant relationship to traditional maritime activity." See *Executive Jet Aviation, Inc.* v. *Cleveland*, 409 U. S. 249, 268 (1972); *Foremost Ins. Co.* v. *Richardson*, 457 U. S. 668 (1982). We need not reach the question whether a maritime nexus also must be established when a tort occurs on the high seas. Were there such a requirement, it clearly was met here, for these ships were engaged in maritime commerce, a primary concern of admiralty law.

C

With admiralty jurisdiction comes the application of substantive admiralty law. See *Executive Jet Aviation*, 409 U. S., at 255. Absent a relevant statute, the general maritime law, as developed by the judiciary, applies. *United States* v. *Reliable Transfer Co.*, 421 U. S. 397, 409 (1975); *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 160–161 (1920). Drawn from state[2] and federal sources, the general maritime law is an amalgam of traditional common-law rules, modifications of those rules, and newly created rules. See *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 625, 630 (1959); *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 373–375 (1959). This Court has developed a body of maritime tort principles, see, *e. g.*, *Kermarec*, *supra*, at 632; see generally Currie, Federalism and the Admiralty: "The Devil's Own Mess," 1960 S. Ct. Rev. 158, 164, and is now asked to incorporate products-liability concepts, long a part of the common law of torts, into the general maritime law. See *Igneri* v. *Cie. de Transports Oceaniques*, 323 F. 2d 257, 260 (CA2 1963), cert. denied, 376 U. S. 949 (1964).

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[2] The charterers do not ask us to defer to the law of New Jersey, the forum State. Nor is application of state-law principles required here. New Jersey lacks any "pressing and significant" interest in the tort action. See *Kossick* v. *United Fruit Co.*, 365 U. S. 731, 739 (1961). In any event, reliance on state law would not help the charterers' case, since it mandates the same conclusion reached by the District Court and the Court of Appeals: that Delaval had no tort duty to the charterers. See *Spring Motors*

The Courts of Appeals sitting in admiralty overwhelmingly have adopted concepts of products liability, based both on negligence, *Sieracki* v. *Seas Shipping Co.*, 149 F. 2d 98, 99–100 (CA3 1945), aff'd on other grounds, 328 U. S. 85 (1946), and on strict liability, *Pan-Alaska Fisheries, Inc.* v. *Marine Constr. & Design Co.*, 565 F. 2d 1129, 1135 (CA9 1977) (adopting Restatement (Second) of Torts § 402A (1965)). Indeed, the Court of Appeals for the Third Circuit previously had stated that the question whether principles of strict products liability are part of maritime law "is no longer seriously contested." *Ocean Barge Transport Co.* v. *Hess Oil Virgin Islands Corp.*, 726 F. 2d 121, 123 (1984) (citing cases).

We join the Courts of Appeals in recognizing products liability, including strict liability, as part of the general maritime law. This Court's precedents relating to injuries of maritime workers long have pointed in that direction. See *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 94 (1946) (strict liability for unseaworthiness); *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.*, 376 U. S. 315, 322 (1964) (strict liability for breach of implied warranty of work-

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Distributors, Inc. v. *Ford Motor Co.*, 98 N. J. 555, 579, 489 A. 2d 660, 672 (1985).

manlike service). The Court's rationale in those cases—that strict liability should be imposed on the party best able to protect persons from hazardous equipment—is equally applicable when the claims are based on products liability. Compare *Sieracki*, 328 U. S., at 93–94, with *Escola* v. *Coca Cola Bottling Co. of Fresno*, 24 Cal. 2d 453, 462, 150 P. 2d 436, 441 (1944) (concurring opinion). And to the extent that products actions are based on negligence, they are grounded in principles already incorporated into the general maritime law. See *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S., at 632. Our incorporation of products liability into maritime law, however, is only the threshold determination to the main issue in this case.

IV

Products liability grew out of a public policy judgment that people need more protection from dangerous products than is afforded by the law of warranty. See *Seely* v. *White Motor Co.*, 63 Cal. 2d 9, 15, 403 P. 2d 145, 149 (1965). It is clear, however, that if this development were allowed to progress too far, contract law would drown in a sea of tort. See G. Gilmore, The Death of Contract 87–94 (1974). We must determine whether a commercial product injuring itself is the kind of harm against which public policy requires manufacturers to protect, independent of any contractual obligation.

A

The paradigmatic products-liability action is one where a product "reasonably certain to place life and limb in peril," distributed without reinspection, causes bodily injury. See, *e. g.*, *MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382, 389, 111 N. E. 1051, 1053 (1916). The manufacturer is liable whether or not it is negligent because "public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market." *Escola* v. *Coca Cola Bot-*

tling Co. of Fresno, 24 Cal. 2d, at 462, 150 P. 2d, at 441 (opinion concurring in judgment).

For similar reasons of safety, the manufacturer's duty of care was broadened to include protection against property damage. See *Marsh Wood Products Co.* v. *Babcock & Wilcox Co.*, 207 Wis. 209, 226, 240 N. W. 392, 399 (1932); *Genesee County Patrons Fire Relief Assn.* v. *L. Sonneborn Sons, Inc.*, 263 N. Y. 463, 469–473, 189 N. E. 551, 553–555 (1934). Such damage is considered so akin to personal injury that the two are treated alike. See *Seely* v. *White Motor Co.*, 63 Cal. 2d, at 19, 403 P. 2d, at 152.

In the traditional "property damage" cases, the defective product damages other property. In this case, there was no damage to "other" property. Rather, the first, second, and third counts allege that each supertanker's defectively designed turbine components damaged only the turbine itself. Since each turbine was supplied by Delaval as an integrated package, see App. 162–163, each is properly regarded as a single unit. "Since all but the very simplest of machines have component parts, [a contrary] holding would require a finding of 'property damage' in virtually every case where a product damages itself. Such a holding would eliminate the distinction between warranty and strict products liability." *Northern Power & Engineering Corp.* v. *Caterpillar Tractor Co.*, 623 P. 2d 324, 330 (Alaska 1981). The fifth count also alleges injury to the product itself. Before the high-pressure and low-pressure turbines could become an operational propulsion system, they were connected to piping and valves under the supervision of Delaval personnel. See App. 78, 162–163, 181. Delaval's supervisory obligations were part of its manufacturing agreement. The fifth count thus can best be read to allege that Delaval's negligent manufacture of the propulsion system—by allowing the installation in reverse of the astern guardian valve—damaged the propulsion system. Cf. *Lewis* v. *Timco, Inc.*, 736 F. 2d 163, 165–166 (CA5 1984). Obviously, damage to a product itself has certain attributes of a products-liability claim. But the injury suffered—the failure of the product to function properly—is the essence of a warranty action, through which a contracting party can seek to recoup the benefit of its bargain.

B

The intriguing question whether injury to a product itself may be brought in tort has spawned a variety of answers.[3] At one end of the spectrum, the case that created the majority land-based approach, *Seely* v. *White Motor Co.*, 63 Cal. 2d 9, 403 P. 2d 145 (1965) (defective truck), held that preserving a proper role for the law of warranty precludes imposing tort liability if a defective product causes purely monetary harm. See also *Jones & Laughlin Steel Corp.* v. *Johns-Manville Sales Corp.*, 626 F. 2d 280, 287, and n. 13 (CA3 1980) (citing cases).

At the other end of the spectrum is the minority land-based approach, whose progenitor, *Santor* v. *A & M Karagheusian, Inc.*, 44 N. J. 52, 66–67, 207 A. 2d 305, 312–313 (1965) (marred carpeting), held that a manufacturer's duty to make nondefective products encompassed injury to the product itself, whether or not the defect created an unreasonable risk of harm.[4] See also *LaCrosse* v. *Schubert, Schroeder & Associates, Inc.*, 72 Wis. 2d 38, 44–45, 240 N. W. 2d 124, 127–128 (1976). The courts adopting this approach, including the majority of the Courts of Appeals sitting in admiralty that have considered the issue,[5] *e. g., Emerson G. M. Diesel, Inc.* v. *Alaskan Enterprise*, 732 F. 2d 1468 (CA9 1984), find that the safety and insurance rationales behind strict liability apply equally where the losses are purely economic. These courts reject the *Seely* approach because they find it arbitrary that economic losses are recoverable if a plaintiff suffers bodily injury or property damage, but not if a product injures itself. They also find no inherent difference between economic loss and personal injury or property damage, because all are proximately caused by the defendant's conduct. Further, they believe recovery for economic loss would not lead to unlimited liability because they think a manufacturer can predict and insure against product failure. See *Emerson G. M. Diesel, Inc.* v. *Alaskan Enterprise*, 732 F. 2d, at 1474.

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[3] The question is not answered by the Restatement (Second) of Torts §§ 395 and 402A (1965), or by the Uniform Commercial Code, see Wade, Is Section 402A of the Second Restatement of Torts Preempted by the UCC and Therefore Unconstitutional?, 42 Tenn. L. Rev. 123 (1974).

Congress, which has considered adopting national products-liability legislation, also has been wrestling with the question whether economic loss should be recoverable under a products-liability theory. See 1 L. Frumer & M. Friedman, Products Liability § 4C (1986). When S. 100, 99th Cong., 1st Sess. (1985) (the Product Liability Act) was introduced, it excluded, § 2(6), recovery for commercial loss. Suggestions have been made for revising this provision. See Amendment 16, 131 Cong. Rec. 5461 (1985); Amendment 100, *id.*, at 11850, 11851. Other bills also have addressed the issue. See S. 1999, *id.*, at 38772 (1985); Amendment 1951, 132 Cong. Rec. 10304 (1986). See also H. R. 2568, 99th Cong., 1st Sess. (1985); H. R. 4425, 99th Cong., 2d Sess. (1986).

The issue also is of concern in the area of conflict of laws. See R. Weintraub, Commentary on the Conflict of Laws § 6.29 (2d ed. 1980).

Between the two poles fall a number of cases that would permit a products-liability action under certain circumstances when a product injures only itself. These cases attempt to differentiate between "the disappointed users . . . and the endangered ones," *Russell* v. *Ford Motor Co.*, 281 Ore. 587, 595, 575 P. 2d 1383, 1387 (1978), and permit only the latter to sue in tort. The determination has been said to turn on the nature of the defect, the type of risk, and the manner in which the injury arose. See *Pennsylvania Glass Sand Corp.* v. *Caterpillar Tractor Co.*, 652 F. 2d, at 1173 (relied on by the Court of Appeals in this case). The Alaska Supreme Court allows a tort action if the defective product creates a situation potentially dangerous to persons or other property, and loss occurs as a proximate result of that danger and under dangerous circumstances. *Northern Power & Engineering Corp.* v. *Caterpillar Tractor Co.*, 623 P. 2d 324, 329 (1981).

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[4] Interestingly, the New Jersey and California Supreme Courts have each taken what appears to be a step in the direction of the other since *Santor* and *Seely*. In *Spring Motors Distributors, Inc.* v. *Ford Motor Co.*, 98 N. J., at 579, 489 A. 2d, at 672, the New Jersey court rejected *Santor* in the commercial context. And in *J'Aire Corp.* v. *Gregory*, 24 Cal. 3d 799, 598 P. 2d 60 (1979), the California court recognized a cause of action for negligent interference with prospective economic advantage.

[5] Most of the admiralty cases concerned fishing vessels. See *Emerson G. M. Diesel, Inc.* v. *Alaskan Enterprise*, 732 F. 2d 1468, 1472 (CA9 1984) (relying on solicitude for fishermen as a reason for a more protective approach). Delaval concedes that the courts, see *Carbone* v. *Ursich*, 209 F. 2d 178, 182 (CA9 1953), and Congress, see 46 U. S. C. App. § 533 (1982 ed., Supp. II), at times have provided special protection for fishermen. This case involves no fishermen.

We find the intermediate and minority land-based positions unsatisfactory. The intermediate positions, which essentially turn on the degree of risk, are too indeterminate to enable manufacturers easily to structure their business behavior. Nor do we find persuasive a distinction that rests on the manner in which the product is injured. We realize that the damage may be qualitative, occurring through gradual deterioration or internal breakage. Or it may be calamitous. Compare *Morrow* v. *New Moon Homes, Inc.*, 548 P. 2d 279 (Alaska 1976), with *Cloud* v. *Kit Mfg. Co.*, 563 P. 2d 248, 251 (Alaska 1977). But either way, since by definition no person or other property is damaged, the resulting loss is purely economic. Even when the harm to the product itself occurs through an abrupt, accident-like event, the resulting loss due to repair costs, decreased value, and lost profits is essentially the failure of the purchaser to receive the benefit of its bargain—traditionally the core concern of contract law. See E. Farnsworth, Contracts § 12.8, pp. 839–840 (1982).

We also decline to adopt the minority land-based view espoused by *Santor* and *Emerson*. Such cases raise legitimate questions about the theories behind restricting products liability, but we believe that the countervailing arguments are more powerful. The minority view fails to account for the need to keep products liability and contract law in separate spheres and to maintain a realistic limitation on damages.

C

Exercising traditional discretion in admiralty, see *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 409 (1953), we adopt an approach similar to *Seely* and hold that a manufacturer in a commercial relationship has no duty under either a negligence or strict products-liability theory to prevent a product from injuring itself.[6]

"The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the 'luck' of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products." *Seely* v. *White Motor Co.*, 63 Cal. 2d, at 18, 403 P. 2d, at 151. When a product injures only itself the reasons for imposing a tort duty are weak and those for leaving the party to its contractual remedies are strong.

The tort concern with safety is reduced when an injury is only to the product itself. When a person is injured, the "cost of an injury and the loss of time or health may be an overwhelming misfortune," and one the person is not prepared to meet. *Escola* v. *Coca Cola Bottling Co.*, 24 Cal. 2d, at 462, 150 P. 2d, at 441 (opinion concurring in judgment). In contrast, when a product injures itself, the commercial user stands to lose the value of the product, risks the displeasure of its customers who find that the product does not meet their needs, or, as in this case, experiences increased costs in performing a service. Losses like these can be insured. See 10A G. Couch, Cyclopedia of Insurance Law §§42:385–42:401, 42:414–417 (2d ed. 1982); 7 E. Benedict, Admiralty, Form No. 1.16–7, p. 1–239 (7th ed. 1985); 5A J. Appleman & J. Appleman, Insurance Law and Practice §3252 (1970). Society need not presume that a customer needs special protection. The increased cost to the public that would result from holding a manufacturer liable in tort for injury to the product itself is not justified. Cf. *United States* v. *Carroll Towing Co.*, 159 F. 2d 169, 173 (CA2 1947).

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[6] We do not reach the issue whether a tort cause of action can ever be stated in admiralty when the only damages sought are economic. Cf. *Ultramares Corp.* v. *Touche*, 255 N. Y. 170, 174 N. E. 441 (1931). But see *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U. S. 303 (1927).

Damage to a product itself is most naturally understood as a warranty claim. Such damage means simply that the product has not met the customer's expectations, or, in other words, that the customer has received "insufficient product value." See J. White & R. Summers, Uniform Commercial Code 406 (2d ed. 1980). The maintenance of product value and quality is precisely the purpose of express and implied warranties.[7] See UCC §2–313 (express warranty), §2–314 (implied warranty of merchantability), and §2–315 (warranty of fitness for a particular purpose). Therefore, a claim of a nonworking product can be brought as a breach-of-warranty action. Or, if the customer prefers, it can reject the product or revoke its acceptance and sue for breach of contract. See UCC §§2–601, 2–608, 2–612.

Contract law, and the law of warranty in particular, is well suited to commercial controversies of the sort involved in this case because the parties may set the terms of their own agreements.[8] The manufacturer can restrict its liability, within limits, by disclaiming warranties or limiting remedies. See UCC §§2–316, 2–719. In exchange, the purchaser pays less for the product. Since a commercial situation generally does not involve large disparities in bargaining power, cf. *Henningsen* v. *Bloomfield Motors, Inc.*, 32 N. J. 358, 161 A. 2d 69 (1960), we see no reason to intrude into the parties' allocation of the risk.

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[7] If the charterers' claims were brought as breach-of-warranty actions, they would not be within the admiralty jurisdiction. Since contracts relating to the construction of or supply of materials to a ship are not within the admiralty jurisdiction, see *Thames Towboat Co.* v. *The Schooner "Francis McDonald"*, 254 U. S. 242, 243 (1920); *Kossick* v. *United Fruit Co.*, 365 U. S., at 735, neither are warranty claims grounded in such contracts. See 1 E. Benedict, Admiralty §188, p. 11–36 (7th ed. 1985). State law would govern the actions. See *North Pacific S.S. Co.* v. *Hall Brothers Marine Railway & Shipbuilding Co.*, 249 U. S. 119, 127 (1919). In particular the Uniform Commercial Code, which has been adopted by 49 States, would apply.

While giving recognition to the manufacturer's bargain, warranty law sufficiently protects the purchaser by allowing it to obtain the benefit of its bargain. See White & Summers, *supra*, ch. 10. The expectation damages available in warranty for purely economic loss give a plaintiff the full benefit of its bargain by compensating for forgone business opportunities. See Fuller & Perdue, The Reliance Interest in Contract Damages: 1, 46 Yale L. J. 52, 60–63 (1936); R. Posner, Economic Analysis of Law §4.8 (3d ed. 1986). Recovery on a warranty theory would give the charterers their repair costs and lost profits, and would place them in the position they would have been in had the turbines functioned properly.[9] See *Hawkins* v. *McGee*, 84 N. H. 114, 146 A. 641

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[8] We recognize, of course, that warranty and products liability are not static bodies of law and may overlap. In certain situations, for example, the privity requirement of warranty has been discarded. *E. g., Henningsen* v. *Bloomfield Motors, Inc.*, 32 N. J. 358, 380–384, 161 A. 2d 69, 81–84 (1960). In other circumstances, a manufacturer may be able to disclaim strict tort liability. See, *e. g., Keystone Aeronautics Corp.* v. *R. J. Enstrom Corp.*, 499 F. 2d 146, 149 (CA3 1974). Nonetheless, the main currents of tort law run in different directions from those of contract and warranty, and the latter seem to us far more appropriate for commercial disputes of the kind involved here.

[9] In contrast, tort damages generally compensate the plaintiff for loss and return him to the position he occupied before the injury. Cf. *Sullivan* v. *O'Connor*, 363 Mass. 579, 584–586, 588, n. 6, 296 N. E. 2d 183, 187–188, 189, n. 6 (1973); Prosser, The Borderland of Tort and Contract, in Selected Topics on the Law of Torts 380, 424–427 (Thomas M. Cooley Lectures, Fourth Series 1953). Tort damages are analogous to reliance damages, which are awarded in contract when there is particular difficulty in mea-

(1929). Thus, both the nature of the injury and the resulting damages indicate it is more natural to think of injury to a product itself in terms of warranty.

A warranty action also has a built-in limitation on liability, whereas a tort action could subject the manufacturer to damages of an indefinite amount. The limitation in a contract action comes from the agreement of the parties and the requirement that consequential damages, such as lost profits, be a foreseeable result of the breach. See *Hadley* v. *Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854). In a warranty action where the loss is purely economic, the limitation derives from the requirements of foreseeability and of privity, which is still generally enforced for such claims in a commercial setting. See UCC § 2-715; White & Summers, *supra*, at 389, 396, 406-410.

In products-liability law, where there is a duty to the public generally, foreseeability is an inadequate brake. Cf. *Kinsman Transit Co.* v. *City of Buffalo*, 388 F. 2d 821 (CA2 1968). See also Perlman, Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine, 49 U. Chi. L. Rev. 61, 71-72 (1982). Permitting recovery for all foreseeable claims for purely economic loss could make a manufacturer liable for vast sums. It would be difficult for a manufacturer to take into account the expectations of persons downstream who may encounter its product. In this case, for example, if the charterers—already one step removed from the transaction—were permitted to recover their economic losses, then the companies that subchartered the ships might claim their economic losses from the delays, and the charterers' customers also might claim their economic losses, and so on. "The law does not spread its protection so far." *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U. S. 303, 309 (1927).

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suring the expectation interest. See, *e. g.*, *Security Stove & Mfg. Co.* v. *American Railways Express Co.*, 227 Mo. App. 175, 51 S. W. 2d 572 (1932).

And to the extent that courts try to limit purely economic damages in tort, they do so by relying on a far murkier line, one that negates the charterers' contention that permitting such recovery under a products-liability theory enables admiralty courts to avoid difficult line drawing. Cf. *Ultramares Corp.* v. *Touche*, 255 N. Y. 170, 174 N. E. 441 (1931); *Louisiana ex rel. Guste* v. *M/V Testbank*, 752 F. 2d 1019, 1046–1052 (CA5 1985) (en banc) (dissenting opinion), cert. pending *sub nom. White* v. *M/V Testbank*, No. 84–1808.

D

For the first three counts, the defective turbine components allegedly injured only the turbines themselves. Therefore, a strict products-liability theory of recovery is unavailable to the charterers. Any warranty claims would be subject to Delaval's limitation, both in time and scope, of its warranty liability. App. 78–79. The record indicates that Seatrain and Delaval reached a settlement agreement. Deposition of Stephen Russell, p. 32. We were informed that these charterers could not have asserted the warranty claims. See Tr. of Oral Arg. 36. Even so, the charterers should be left to the terms of their bargains, which explicitly allocated the cost of repairs.

In the charterers' agreements with the owners, the charterers took the ships in "as is" condition, after inspection, and assumed full responsibility for them, including responsibility for maintenance and repairs and for obtaining certain forms of insurance. *Id.*, at 11, 16–17, 35; App. 86, 88, 99, 101, 112, 114, 125–126, 127. In a separate agreement between each charterer and Seatrain, Seatrain agreed to guarantee certain payments and covenants by each charterer to the owner. *Id.*, at 142–156. The contractual responsibilities thus were clearly laid out. There is no reason to extricate the parties from their bargain.

Similarly, in the fifth count, alleging the reverse installation of the astern guardian valve, the only harm was to the propulsion system itself rather than to persons or other property. Even assuming that Delaval's supervision was negligent, as we must on this summary judgment motion, Delaval owed no duty under a products-liability theory based on negligence to avoid causing purely economic loss. Cf. *Flintkote Co.* v. *Dravo Corp.*, 678 F. 2d 942 (CA11 1982); *S. M. Wilson & Co.* v. *Smith International, Inc.*, 587 F. 2d 1363 (CA9 1978). Thus, whether stated in negligence or strict liability, no products-liability claim lies in admiralty when the only injury claimed is economic loss.

While we hold that the fourth count should have been dismissed, we affirm the entry of judgment for Delaval.

It is so ordered.

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION *v.* WOLD ENGINEERING, P. C., ET AL.

CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

No. 84-1973. Argued March 24, 1986—Decided June 16, 1986

Petitioner Indian tribe brought suit against respondent corporation (hereafter respondent) in a North Dakota state court for negligence and breach of contract in connection with respondent's construction of a water-supply system on petitioner's reservation. The trial court dismissed the suit for lack of jurisdiction. The North Dakota Supreme Court held that a North Dakota statute (Chapter 27-19)—which provides that jurisdiction of the State shall be extended over all civil claims for relief that arise on an Indian reservation upon acceptance by Indian citizens—disclaimed the unconditional state court civil jurisdiction North Dakota had previously extended to tribal Indians suing non-Indians in state court, and that Chapter 27-19 barred petitioner from maintaining its suit in state court absent its waiver of sovereign immunity.

Held:

1. Because the federal statute governing state assumption of jurisdiction over Indian country, Pub. L. 280, was designed to extend the jurisdiction of the States over Indian country and to encourage state assumption of such jurisdiction, and because Congress specifically considered the issue of retrocession but did not provide for disclaimers of jurisdiction lawfully acquired other than under Pub. L. 280 prior to 1968, such disclaimers cannot be reconciled with the congressional plan embodied in Pub. L. 280 and thus are pre-empted. Pp. 884-887.

2. The conclusion that the operation of the North Dakota jurisdictional scheme in this case is inconsistent with federal law is reinforced by the fact that it imposes an undue burden on federal and tribal interests in Indian self-government and autonomy, as well as the federal interest in ensuring access to the courts. Pp. 887-893.

364 N. W. 2d 98, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BRENNAN and STEVENS, JJ., joined, *post*, p. 893.

Raymond Cross argued the cause for petitioner. With him on the brief were *John O. Holm* and *Christopher D. Quale.*

Gary H. Lee argued the cause and filed a brief for respondents.*

JUSTICE O'CONNOR delivered the opinion of the Court.

Petitioner, Three Affiliated Tribes of the Fort Berthold Reservation, sought to sue respondent, Wold Engineering, P. C. (hereafter respondent), in state court for negligence and breach of contract. The North Dakota Supreme Court held that Chapter 27–19 of the North Dakota Century Code (1974) disclaimed the unconditional state court civil jurisdiction North Dakota had previously extended to tribal Indians suing non-Indians in state court. It ruled that under Chapter 27–19, petitioner could not avail itself of state court jurisdiction unless it consented to waive its sovereign immunity and to have any civil disputes in state court to which it is a party adjudicated under state law. 364 N. W. 2d 98 (1985). The question presented is whether Chapter 27–19, as construed by the North Dakota Supreme Court, is repugnant to the Federal Constitution or is pre-empted by federal Indian law.

I

This is the second time this Court has been called upon to address this jurisdictional controversy. See *Three Affiliated Tribes* v. *Wold Engineering,* 467 U. S. 138 (1984) *(Three Tribes I).* Because the facts and procedural history of the litigation were set forth in some detail in *Three Tribes I,* our present recitation will be brief.

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*Briefs of *amici curiae* urging reversal were filed for the Standing Rock Sioux Tribe et al. by *Reid Peyton Chambers, Donald J. Simon,* and *Kevin A. Griffin;* and for the Turtle Mountain Band of Chippewa Indians by *Kim Jerome Gottschalk.*

Nicholas J. Spaeth, Attorney General, and *Terry L. Adkins,* Assistant Attorney General, filed a brief for the State of North Dakota as *amicus curiae* urging affirmance.

Historically, Indian territories were generally deemed beyond the legislative and judicial jurisdiction of the state governments. See *id.*, at 142. This restriction was reflected in the federal statute which admitted North Dakota to the Union, Enabling Act of Feb. 22, 1889, § 4, cl. 2, 25 Stat. 677, and was embodied in the form of jurisdictional disclaimers in North Dakota's original Constitution. See N. D. Const., Art. XVI, § 203, cl. 2 (1889). The pre-existing federal restrictions on state jurisdiction over Indian country were largely eliminated, however, in 1953 with Congress' enactment of the Act of Aug. 15, 1953, 67 Stat. 588, as amended, 28 U. S. C. § 1360, which is commonly known as Pub. L. 280. Public Law 280 gave federal consent to the assumption of state civil and criminal jurisdiction over Indian country and provided the procedures by which such an assumption could be made. See *Three Tribes I*, *supra*, at 143. As originally enacted, Pub. L. 280 did not require the States to obtain the consent of affected Indian tribes before assuming jurisdiction over them, but Title IV of the Civil Rights Act of 1963 amended Pub. L. 280 to require that all subsequent assertions of jurisdiction be preceded by tribal consent. Pub. L. 90–284, §§ 401, 402, 406, 82 Stat. 78–80, codified at 25 U. S. C. §§ 1321, 1322, 1326.

As this Court explained in *Three Tribes I:*

> "Even before North Dakota moved to amend its Constitution and assume full jurisdiction under Pub. L. 280, the North Dakota Supreme Court had taken an *expansive* view of the scope of state-court jurisdiction over Indians in Indian country. In 1957, the court held [in *Vermillion* v. *Spotted Elk*, 85 N. W. 2d 432 (1957)] that the existing jurisdictional disclaimers in the Enabling Act and the State's Constitution foreclosed civil jurisdiction over Indian country only in cases involving interests in Indian lands themselves." 467 U. S., at 143–144.

Although *Vermillion* v. *Spotted Elk*, 85 N. W. 2d 432 (1957), was decided after the enactment of Pub. L. 280, the North

Dakota Supreme Court made clear that it was confirming pre-existing jurisdiction rather than establishing a previously unavailable jurisdictional category. *Id.*, at 435–436. See also *Three Tribes I, supra,* at 150, n. 9.

That part of *Vermillion* that recognized jurisdiction over non-Indians' claims against Indians impermissibly intruded on tribal self-government and thus could not be sustained. 467 U. S., at 148. See also *Fisher* v. *District Court,* 424 U. S. 382 (1976); *Williams* v. *Lee,* 358 U. S. 217 (1959). But, as this Court in *Three Tribes I* affirmed, North Dakota's recognition of jurisdiction over the claims of Indian plaintiffs against non-Indian defendants was lawful because such jurisdiction did not interfere with the right of tribal Indians to govern themselves and was not subject to Pub. L. 280's procedural requirements since the jurisdiction was lawfully assumed prior to that enactment. See 467 U. S., at 148–149, 151, n. 11.

In 1958, North Dakota amended its Constitution to authorize its legislature to provide by statute for the acceptance of jurisdiction over Indian country, see N. D. Const., Art. XIII, § 1, cl. 2, and in 1963, the North Dakota Legislature enacted Chapter 27–19. That Chapter provides, in pertinent part:

> "In accordance with the provisions of Public Law 280 . . . and [the amended] North Dakota constitution, jurisdiction of the state of North Dakota shall be extended over all civil claims for relief which arise on an Indian reservation upon acceptance by Indian citizens in a manner provided by this chapter. Upon acceptance the jurisdiction of the state is to the same extent that the state has jurisdiction over other civil claims for relief, and those civil laws of this state that are of general application to private property have the same force and effect within such Indian reservation or Indian country as they have elsewhere within this state." N. D. Cent. Code § 27–19–01 (Supp. 1985).

In subsequent cases, the North Dakota Supreme Court read this provision to "completely disclaim" the state jurisdiction recognized in *Vermillion* in cases in which the defendant was an Indian, absent tribal consent to jurisdiction as provided by statute. See, *e. g., In re Whiteshield,* 124 N. W. 2d 694 (1963). However, until the instant suit, the court never squarely held that Chapter 27–19 also disclaimed the jurisdiction *Vermillion* lawfully recognized over cases in which an Indian sued a non-Indian in state court for a claim arising in Indian country. See *Three Tribes I,* 467 U. S., at 144–145.

Petitioner filed the instant suit against respondent in state court for negligence and breach of contract in connection with respondent's construction of a water-supply system on petitioner's reservation. At the time the suit was filed, petitioner's tribal court did not have jurisdiction over such claims. After counterclaiming for petitioner's alleged failure to make payments on the system, respondent moved to dismiss petitioner's complaint, arguing that the state court had no jurisdiction because petitioner has never consented to state court jurisdiction over the Fort Berthold Reservation under Chapter 27–19. The trial court dismissed the suit for lack of jurisdiction, and the North Dakota Supreme Court affirmed the dismissal on appeal. 321 N. W. 2d 510 (1982).

In so doing, the North Dakota Supreme Court held that any residuary jurisdiction the North Dakota courts possessed under *Vermillion* over suits by an Indian against a non-Indian arising in Indian country was "totally disclaimed" when the North Dakota Legislature, "[u]nder the authority of Public Law 280," instituted the consent requirement of Chapter 27–19. 321 N. W. 2d, at 511–512. It concluded that "we have no jurisdiction over civil causes of action arising within the exterior boundaries of an Indian reservation, unless the Indian citizens of the reservation vote to accept jurisdiction." *Id.,* at 512. The court also rejected petitioner's federal and state constitutional challenges, relying in part on the argument that the discrimination against Indian litigants embodied in Chapter 27–19 was authorized by Pub. L. 280 and was therefore insulated, under *Washington* v. *Yakima Indian Nation,* 439 U. S. 463 (1979), from heightened scrutiny. See 321 N. W. 2d, at 512–513.

This Court granted certiorari. 461 U. S. 904 (1983). We held that federal law did not preclude the state court from asserting jurisdiction over petitioner's claim. In particular, we ruled that Pub. L. 280 neither required nor authorized North Dakota to disclaim the jurisdiction it had lawfully exercised over the claims of Indian plaintiffs against non-Indian defendants prior to the enactment of Pub. L. 280. See *Three Tribes I,* 467 U. S., at 150. Because the North Dakota Supreme Court's interpretation of Chapter 27–19 and its accompanying constitutional analysis appeared to rest on a possible misunderstanding of Pub. L. 280, this Court vacated the judgment and remanded the case to allow the North Dakota court to reconsider the jurisdictional questions in light of the proper interpretation of the governing federal statute. *Id.,* at 141.

On remand, the North Dakota Supreme Court held that Chapter 27–19 terminated any residuary jurisdiction that may have existed over claims arising in Indian country brought by tribal Indians against non-Indians in state court. 364 N. W. 2d, at 104. It further held that state law barred petitioner from maintaining its suit in state court absent its waiver of its sovereign immunity in accordance with the statutory procedures. *Id.,* at 103–104. Finally, the court rejected petitioner's due process and equal protection challenges. It stated that petitioner had not been denied a due process right to access to the courts by action of the State, reasoning that it was the Indian people who had deprived themselves of access to state jurisdiction in declining to avail themselves of the State's jurisdictional offer by waiving their sovereign immunity. See *id.,* at 106. The North Dakota court then ruled that the jurisdictional disclaimer did not violate the Equal Protection Clause because, by virtue of the consent provision, "[t]he statute does not treat [the Tribe] less than equal, it treats them more than equal." *Id.*, at 107.

We granted certiorari to examine petitioner's claims that Chapter 27-19 violates the Federal Constitution and is pre-empted by federal Indian law. Although respondent at no time objected to our consideration of the federal pre-emption issue, and in fact briefed it on the merits, our review of the proceedings below indicates that this question was not explicitly raised before, and was not decided by the North Dakota Supreme Court. We have recognized that in such circumstances there is a "weighty presumption against review." *Heath* v. *Alabama*, 474 U. S. 82, 87 (1985). See also *Illinois* v. *Gates*, 462 U. S. 213, 218–222 (1983). We believe, however, that this presumption has been overcome in this instance by a combination of circumstances.

First, respondent's failure to raise any challenge to our consideration of the pre-emption issue, cf. *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 815–816 (1985), and its apparent willingness to have the question decided, argues for review. Second, this case has already been sent back to the North Dakota Supreme Court once, and we are reluctant to further burden that court by resolving less than all the federal questions addressed by the parties. Since we have twice had the benefit of the Supreme Court of North Dakota's reasoning on closely aligned issues, we do not believe that our consideration of the federal pre-emption issue is a disservice to that court or to the litigants, or impairs our informed decision of the issue.

Because we believe that the North Dakota law is pre-empted insofar as it is applied to disclaim pre-existing jurisdiction over suits by tribal plaintiffs against non-Indians for which there is no other forum, absent the Tribe's waiver of its sovereign immunity and consent to the application of state civil law in all cases to which it is a party, we reverse.

II

Our cases reveal a "'trend . . . away from the idea of inherent Indian sovereignty as a[n independent] bar to state jurisdiction and toward reliance on federal pre-emption.'" *Rice* v. *Rehner*, 463 U. S. 713, 718 (1983) (quoting *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 172 (1973) (footnote omitted)). Yet considerations of tribal sovereignty, and the federal interests in promoting Indian self-governance and autonomy, if not of themselves sufficient to "pre-empt" state regulation, nevertheless form an important backdrop against which the applicable treaties and federal statutes must be read. See, *e. g.*, *New Mexico* v. *Mescalero Apache Tribe*, 462 U. S. 324, 334 (1983); *Rice* v. *Rehner*, *supra*, at 718–719. Accordingly, we have formulated a comprehensive pre-emption inquiry in the Indian law context which examines not only the congressional plan, but also "the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 145 (1980). In the instant case, this pre-emption inquiry yields the conclusion that the legislative plan embodied in Pub. L. 280 forecloses North Dakota from disclaiming jurisdiction over petitioner's suit, and further, that the state interest advanced by the North Dakota jurisdictional scheme in this context is overshadowed by longstanding federal and tribal interests.

A

Public Law 280 represents the primary expression of federal policy governing the assumption by States of civil and criminal jurisdiction over the Indian Nations. The Act was the result of "comprehensive and detailed congressional scrutiny," *Kennerly* v. *District Court of Montana*, 400 U. S. 423, 424, n. 1, 427 (1971), and was intended to replace the ad hoc regulation of state jurisdiction over Indian country with general legislation, providing "for all affected States to come within its terms." S. Rep. No. 699, 83d Cong., 1st Sess., 5 (1953). See also Goldberg, Public Law 280: The Limits of State Jurisdiction over Reservation Indians, 22 UCLA L. Rev. 535, 540–544 (1975). In examining the effect of comprehensive legislation governing Indian matters such as this, "our cases have rejected a narrow focus on congressional intent to pre-empt state law as the sole touchstone. They have also rejected the proposition that pre-emption requires 'an express congressional statement to that effect.'" *New Mexico* v. *Mescalero Apache Tribe*, *supra*, at 334 (quoting *White Mountain Apache Tribe* v. *Bracker*, *supra*, at 144) (footnote omitted). See also *Rice* v. *Rehner*, *supra*, at 719. Rather, we have found that where a detailed federal regulatory scheme exists and where its general thrust will be impaired by incompatible state action, that state action, without more, may be ruled pre-empted by federal law. See, *e. g.*, *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U. S. 685 (1965).

Given the comprehensiveness of the federal regulation in this area of Indian law, our conclusion in *Three Tribes I* that Congress generally intended to authorize the assumption, not the disclaimer, of state jurisdiction over Indian country is persuasive evidence that the instant disclaimer conflicts with the federal scheme. See 467 U. S., at 150. But we need not rest upon this conclusion alone, for Congress' specific treatment of the retrocession of previously assumed jurisdiction permits no doubt that North Dakota's disclaimer is inconsistent with the requirements of Pub. L. 280.

As originally enacted, Pub. L. 280 plainly contemplated that, if States chose to extend state court jurisdiction over causes of action arising in Indian country, they would be required to honor that commitment, for the Act made no provision for States to return any jurisdiction to the United States. See F. Cohen, Handbook of Federal Indian Law 370 (1982) (hereinafter Cohen). Congress' failure to provide for the retrocession of jurisdiction assumed by the States is fully consistent with the purposes underlying Pub. L. 280: promoting the gradual assimilation of Indians into the dominant American culture and easing the fiscal and administrative burden borne by the Federal Government by virtue of its control over Indian affairs. See Goldberg, *supra*, at 542–544. See also H. R. Rep. No. 848, 83d Cong., 1st Sess., 3, 6 (1953). Were States permitted, at their option and at any time, to retrocede all or part of the jurisdiction they had assumed and to leave Indians with no recourse for civil wrongs, the congressional plan of gradual but steady assimilation could be disrupted and the divestment of federal dominance nullified.

When Congress subsequently revisited the question of retrocession in the 1968 amendments, it provided that "[t]he United States is authorized to accept a retrocession by any State," 25 U. S. C. § 1323(a), but it specifically limited this authorization to the retrocession of jurisdiction assumed under Pub. L. 280 pursuant to the original 1953 version of the statute. See *ibid.* (permitting retrocession of jurisdiction "acquired by [the] State pursuant to the provisions of section 1162 of title 18, of the United States Code, section 1360 of title 28, of the United States Code, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section"). See also Exec. Order No. 11435, 3 CFR 754 (1966–1970 Comp.) (giving Secretary of the Interior discretionary authority to accept retrocession of jurisdiction by a State); Goldberg, *supra*, at 558–559. This retrocession provision apparently was added in response to Indian dissatisfaction with Pub. L. 280. See Cohen 370. In light of this congressional purpose, the fact that Congress did not provide for retrocession of jurisdiction lawfully assumed prior to the enactment of Pub. L. 280 or of jurisdiction assumed after 1968 cannot be attributed to mere oversight or inadvertence. Since Congress was motivated by a desire to shield the Indians from unwanted extensions of jurisdiction over them, there was no need to provide for retrocession in those circumstances because the previously assumed jurisdiction over Indian country was only lawful to the extent that it was consistent with Indian tribal sovereignty and self-government, see, *e. g.*, *Williams* v. *Lee*, 358 U. S. 217 (1959), and the jurisdiction assumed after 1968 could be secured only upon the receipt of tribal consent. See 25 U. S. C. § 1321.

North Dakota may not, and indeed has not attempted to, rely on § 1323(a) as authority for its disclaimer of jurisdiction over claims such as petitioner's because it did not assume such jurisdiction under any of the provisions specified in § 1323(a), nor has the United States accepted the retrocession. We have previously enforced the procedural requirements and the jurisdictional provisions of Pub. L. 280 quite stringently, consistent with our understanding that the jurisdictional scheme embodied in that Act was the product of a wide-ranging and detailed congressional study. See, *e. g.*, *Kennerly* v. *District Court of Montana*, 400 U. S., at 427. See also *Washington* v. *Yakima Indian Nation*, 439 U. S., at 484 ("the procedural requirements of Pub. L. 280 must be strictly followed"); *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S., at 180. Accordingly, we conclude that since North Dakota's disclaimer is not authorized by § 1323(a), it is barred by that section.

In sum, because Pub. L. 280 was designed to extend the jurisdiction of the States over Indian country and to encourage state assumption of such jurisdiction, and because Congress specifically considered the issue of retrocession but did not provide for disclaimers of jurisdiction lawfully acquired other than under Pub. L. 280 prior to 1968, we must conclude that such disclaimers cannot be reconciled with the congressional plan embodied in Pub. L. 280 and thus are pre-empted by it.

B

Our consideration of the State's interest in disclaiming the pre-existing, unconditional jurisdiction extended to tribal

Indians suing non-Indian defendants, and in replacing it with an extension of jurisdiction conditioned on the Tribe's waiver of its sovereign immunity and its agreement to the application of state law in all suits to which it is a party, reinforces our conclusion that Chapter 27–19 is inconsistent with federal law. Simply put, the state interest, as presently implemented, is unduly burdensome on the federal and tribal interests.

As the North Dakota Supreme Court explained, Chapter 27–19 was originally designed as a unilateral assumption of jurisdiction over Indian country, which was intended to provide a means of enforcing contracts between Indians and non-Indians and a tribunal for trying tort actions, family law matters, and "many [other] types of actions too numerous to mention." 364 N. W. 2d, at 102, and n. 5. The North Dakota Legislature added the consent provision to Chapter 27–19 as a compromise to "accommodate the will of the Indian people." *Id.*, at 103. Those Indians who opposed the assertion of state jurisdiction against them would not be subjected to it absent consent, but neither would they be permitted to enjoy state jurisdiction as plaintiffs absent consent to suit as defendants. See *id.*, at 107. Certainly, the State's interest in requiring that all its citizens bear equally the burdens and the benefits of access to the courts is readily understandable. But here, federal interests exist which override this state interest.

The federal interest in ensuring that all citizens have access to the courts is obviously a weighty one. See, *e. g.*, *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508, 510, 513–514 (1972); *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U. S. 731, 741, 742–744 (1983). This Court and many state courts have long recognized that Indians share this interest in access to the courts, and that tribal autonomy and self-government are not impeded when a State allows an Indian to enter its court to seek relief against a non-Indian concerning a claim arising in Indian country. See, *e. g., Three Tribes I,* 467 U. S., at 148, and n. 7 (citing authority). North Dakota conditions the Tribe's access to the courts on its waiver of its tribal sovereign immunity and agreement to the application of state civil law in all state court civil actions to which it is or may be a party. These conditions apply regardless of whether, as here, the Tribe has no other effective means of securing relief for civil wrongs. As the State concedes, even if the Tribe were to have access to tribal court to resolve civil controversies with non-Indians, it would be unable to enforce those judgments in state court; thus, the Tribe cannot be said to have a meaningful alternative to state adjudication by way of access to other tribunals in such cases. See Tr. of Oral Arg. 26, 27. Cf. *Lohnes* v. *Cloud,* 254 N. W. 2d 430 (N. D. 1977). Respondent argues that the Tribe is not truly deprived of access to the courts by the North Dakota jurisdictional scheme because the Tribe could have unrestricted access to the State's courts by "merely" consenting to the statutory conditions. We conclude, however, that those statutory conditions may be met only at an unacceptably high price to tribal sovereignty and thus operate to effectively bar the Tribe from the courts.

The North Dakota jurisdictional scheme requires the Tribe to accept a potentially severe intrusion on the Indians' ability to govern themselves according to their own laws in order to regain their access to the state courts. The statute provides that "[t]he civil jurisdiction herein accepted and assumed [upon Indian consent] shall include but shall not be limited to the determination of parentage of children, termination of parental rights, commitments by county courts, guardianship, marriage contracts, and obligations for the support of spouse, children, or other dependents." N. D. Cent. Code § 27–19–08 (Supp. 1985). Although these subjects clearly encompass areas of traditional tribal control, see *Fisher* v. *District Court,* 424 U. S., at 388–389; *United States* v. *Quiver,* 241 U. S. 602 (1916), the North Dakota statute contemplates that state civil law will control in these areas. See

§27-19-01. Respondent argues that Chapter 27-19 safeguards tribal self-government by also providing that any tribal ordinance or custom "shall, if not inconsistent with the applicable civil law of this state, be given full force and effect in the determination of civil claims for relief pursuant to this section." §27-19-09. This provision plainly provides that state law will generally control, however, and will merely be supplemented by nonconflicting Indian ordinances or customs, even in cases that arise on the reservation, that involve only Indians, and that concern subjects which are within the jurisdiction of the tribal court.

This result simply cannot be reconciled with Congress' jealous regard for Indian self-governance. See, *e. g., New Mexico* v. *Mescalero Apache Tribe,* 462 U. S., at 334-335, and n. 17 ("[B]oth the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes"). See also *Fisher* v. *District Court, supra,* at 388-389. "A tribe's power to prescribe the conduct of tribal members has never been doubted, and our cases establish that 'absent governing Acts of Congress,' a State may not act in a manner that 'infringe[s] on the right of reservation Indians to make their own laws and be ruled by them.'" *New Mexico* v. *Mescalero Apache Tribe, supra,* at 332 (quoting *McClanahan* v. *Arizona State Tax Comm'n,* 411 U. S., at 171-172).

Chapter 27-19's requirement that the Tribe consent to suit in *all* civil causes of action before it may again gain access to state court as a plaintiff also serves to defeat the Tribe's federally conferred immunity from suit. The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance. See, *e. g., Santa Clara Pueblo* v. *Martinez,* 436 U. S. 49 (1978). Of course, because of the peculiar "quasi-sovereign" status of the Indian tribes, the Tribe's immunity is not congruent with that which the Federal Government, or the States, enjoy. *United States* v. *United States Fidelity & Guaranty Co.,* 309

U. S. 506, 513 (1940). Cf. also *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, at 173. And this aspect of tribal sovereignty, like all others, is subject to plenary federal control and definition. See *Santa Clara Pueblo* v. *Martinez*, *supra*, at 58. Nonetheless, in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States.

To be sure, not all conditions imposed on access to state courts which potentially affect tribal immunity, and thus tribal self-government, are objectionable. For instance, even petitioner concedes that its tribal immunity does not extend to protection from the normal processes of the state court in which it has filed suit. See Tr. of Oral Arg. 7, 10–11 ("The Three Affiliated Tribes believe it would be proper in the interest of justice that they would be subject to discovery proceedings and to proceedings that would insure a fair trial to the non-Indian defendants"). Petitioner also concedes that a non-Indian defendant may assert a counterclaim arising out of the same transaction or occurrence that is the subject of the principal suit as a setoff or recoupment. See *id.*, at 6–7, 9. It is clear, however, that the extent of the waiver presently required by Chapter 27–19 is unduly intrusive on the Tribe's common law sovereign immunity, and thus on its ability to govern itself according to its own laws. By requiring that the Tribe open itself up to the coercive jurisdiction of state courts for *all* matters occurring on the reservation, the statute invites a potentially severe impairment of the authority of the tribal government, its courts, and its laws. See, *e. g.*, *Fisher* v. *District Court*, *supra*, at 387–388.*

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*The extent to which respondent's counterclaim may be used not only to defeat or reduce petitioner's recovery, but also to fix the Tribe's affirmative liability has been the subject of some discussion in this case. See, *e. g.*, Tr. of Oral Arg. 6–11. We have no occasion to resolve this issue because the case comes to us before trial and we do not know the extent of the counterclaim asserted by respondent.

Public Law 280 certainly does not constitute a "governing Act of Congress" which validates this type of interference with tribal immunity and self-government. We have never read Pub. L. 280 to constitute a waiver of tribal sovereign immunity, nor found Pub. L. 280 to represent an abandonment of the federal interest in guarding Indian self-governance. As we explained in *Bryan* v. *Itasca County*, 426 U. S. 373, 387–388 (1976):

> "Today's congressional policy toward reservation Indians may less clearly than in 1953 favor their assimilation, but Pub. L. 280 was plainly not meant to effect total assimilation . . . . [N]othing in its legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than 'private, voluntary organizations,' *United States* v. *Mazurie*, 419 U. S. 544, 557 (1975) . . . . The Act itself refutes such an inference: there is notably absent any conferral of state jurisdiction over the tribes themselves, and § 4(c), 28 U. S. C. § 1360(c), providing for the 'full force and effect' of any tribal ordinances or customs 'heretofore or hereafter adopted by an Indian tribe . . . if not inconsistent with any applicable civil law of the State,' contemplates the continuing vitality of tribal government." (Footnote omitted.)

Certainly, the 1968 amendments to Pub. L. 280 pointedly illustrate the continuing congressional concern over tribal sovereignty. The impetus for the addition of a consent requirement in the 1968 amendments was congressional dissatisfaction with the involuntary extension of state jurisdiction over Indians who did not feel they were ready to accept such jurisdiction, or who felt threatened by it. See, *e. g.*, S. Rep. No. 721, 90th Cong., 1st Sess., 32 (1967) (views of Sen. Ervin) ("Tribes have been critical of Public Law 280 because it authorizes the unilateral application of State law to all tribes without their consent and regardless of their needs or special circumstances. Moreover, it appears that tribal laws were unnecessarily preempted . . ."); Rights of Members of Indian Tribes: Hearing on H. R. 15419 and Related Bills before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 90th Cong., 2d Sess., 25 (1968) (referring to tribal consent requirement as a way to ensure that Indians are not "subjected" to state courts' jurisdiction before they are ready).

In sum, the State's interest is overly broad and overly intrusive when examined against the backdrop of the federal and tribal interests implicated in this case. See *Rice* v. *Rehner*, 463 U. S., at 719. The perceived inequity of permitting the Tribe to recover from a non-Indian for civil wrongs in instances where a non-Indian allegedly may not recover against the Tribe simply must be accepted in view of the overriding federal and tribal interests in these circumstances, much in the same way that the perceived inequity of permitting the United States or North Dakota to sue in cases where they could not be sued as defendants because of their sovereign immunity also must be accepted. Our examination of the state, tribal, and federal interests implicated in this case, then, reinforces our conclusion that North Dakota's disclaimer of jurisdiction over suits such as this cannot be reconciled with the congressional plan embodied in Pub. L. 280.

The judgment of the North Dakota Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE REHNQUIST, with whom JUSTICE BRENNAN and JUSTICE STEVENS join, dissenting.

North Dakota law provides that in order for an Indian tribe such as petitioner to avail itself of the jurisdiction of North Dakota courts as a plaintiff, it must also accept the jurisdiction of those courts when it is properly named as a defendant in them. This Court holds that such a rule—which would commend itself to most people as eminently fair—is pre-empted by federal law. To support this conclusion the Court advances two arguments: first, pre-emption by Pub. L. 280, and, second, the "overshadowing" of the state interest by "longstanding federal and tribal interests." *Ante*, at 884. Neither by themselves nor in the rather awkward juxtaposition in which the Court places them are these arguments persuasive.

The Court's argument based on Pub. L. 280 consists of two assertions: (1) Pub. L. 280 pre-empts Chapter 27–19's disclaimer of pre-existing jurisdiction because the federal statute establishes a "comprehensive" legislative plan to govern Indian matters, and Chapter 27–19's disclaimer is incompatible with the plan's general purpose to authorize the assumption of state jurisdiction over Indian country, *ante*, at 884–885; and (2) the initial failure of Pub. L. 280 to authorize a disclaimer of jurisdiction, combined with the subsequent authorization of such disclaimer in the 1968 amendments with respect to jurisdiction assumed pursuant to Pub. L. 280, evidence a congressional intent to forbid the disclaimer of jurisdiction assumed prior to the passage of Pub. L. 280. *Ante*, at 885–887.

The Court provides no support for its assertion that Pub. L. 280 establishes a "comprehensive" federal scheme that pre-empts any state law that may inhibit the accomplishment of its general purpose. The Court's citation to *Kennerly* v. *District Court of Montana*, 400 U. S. 423, 427 (1971) *(per curiam)*, is unhelpful; the Court there was describing the "comprehensive and detailed" scrutiny that Congress appeared to give in deciding whether or not to eliminate federal barriers to state jurisdiction over Indian matters, and not the nature of Pub. L. 280. In addition, the brevity of Pub. L. 280, its 1968 amendments, and the relevant legislative history belie the Court's assertion that these statutes establish a "comprehensive" plan like statutes that occupy a given field of regulation. Cf. *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 248 (1984). Public Law 280 does little more than make a general pronouncement that certain federal barriers to state jurisdiction have been eliminated. See Act of Aug. 15, 1953, ch. 505, § 7, 67 Stat. 590. Nor does the legislative history, the 1968 amendments, or their legislative history provide any additions that transform the general pronouncement into a "comprehensive" plan. See S. Rep. No. 699, 83d Cong., 1st Sess. (1953); Pub. L. 90–284, Title IV, §§ 402, 403, 82 Stat. 79; S. Rep. No. 721, 90th Cong., 1st Sess. (1967).

There is also nothing inconsistent between the State's disclaimer of pre-existing jurisdiction and the purpose of Pub. L. 280. Congress stated that Pub. L. 280 was designed to accomplish two general purposes:

> "First, withdrawal of Federal responsibility for Indian affairs wherever practicable; and second, termination of the subjection of Indians to Federal laws applicable to Indians as such." S. Rep. No. 699, *supra*, at 3.

The statute's elimination of certain federal barriers to the assertion of state jurisdiction over Indian country was an important means of furthering these goals. But the statute's complete silence on the disclaimer of state jurisdiction cannot reasonably be taken to imply an intent to forbid such disclaimer. This is especially true with respect to jurisdiction lawfully assumed before the passage of Pub. L. 280, since disclaimer of such jurisdiction would certainly have been entirely proper before passage of the Act.

Nor can any congressional intent to forbid the disclaimer of jurisdiction asserted prior to the passage of Pub. L. 280 be reasonably inferred from the subsequent authorization of such disclaimer with respect to jurisdiction asserted pursuant to Pub. L. 280. This Court has long recognized that federal law has a "generally interstitial character," *Richards* v. *United States*, 369 U. S. 1, 7 (1962), in the sense that Congress generally enacts legislation against the background of existing state law. See, *e. g.*, *Burks* v. *Lasker*, 441 U. S.

471, 478 (1979), citing P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 470–471 (2d ed. 1973). An appreciation for this traditional understanding of the nature of state power does not render superfluous the congressional authorization of disclaimer in the 1968 amendments to Pub. L. 280. See Pub. L. 90–284, Title IV, §§402, 403, 82 Stat. 79. Since the 1968 amendments were generally designed to impose a limitation on the ability of state legislatures to assert jurisdiction over Indian country, Congress could reasonably have intended the provision authorizing the disclaimer of previously asserted jurisdiction to encourage such disclaimer with a concomitant retention of a more limited form of jurisdiction. That the disclaimer provision referred only to jurisdiction asserted pursuant to Pub. L. 280 says nothing about congressional intent as to jurisdiction lawfully asserted in some other way. Given the traditional powers of state government, it is unreasonable to interpret such silence as evidence of an intent to forbid the States to disclaim jurisdiction asserted in another way. I find the Court's pre-emption analysis to be quite unconvincing.

I think the Court's reasoning supporting its conclusion that federal and tribal interests "overshadow" the State's interest in fair play for litigants fares no better than its reasoning about Pub. L. 280. The requirement that a tribe consent to the general civil jurisdiction of state courts as a *quid pro quo* for access to those courts as a plaintiff seems entirely fair and evenhanded to me. Nothing in Pub. L. 280 or any other federal statute requires a State to accept jurisdiction over Indian country in the first place. Nor has such an obligation been created as a matter of federal case law dealing with the Indians. To the contrary, all the cases and statutes with which I am familiar speak only to the limitations on the *assertion* of jurisdiction over these matters. Thus, because Congress and this Court have left the States free to bar access entirely by simply not asserting jurisdiction over Indian country at all, I do not see how any "federal interest" precludes them from establishing conditions on the assertion of jurisdiction, and thereby on access to state courts, as North Dakota has done here: the employment of the North Dakota courts in matters in which the tribe has an interest shall not be solely at the option of the tribe.

I think there is nothing in Pub. L. 280 nor in federal Indian policy that prohibits North Dakota from applying its statute in the manner in which it did in this case, and I therefore dissent from the Court's contrary conclusion.

ATTORNEY GENERAL OF NEW YORK *v.* SOTO-LOPEZ ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 84-1803. Argued January 15, 1986—Decided June 17, 1986

The New York Constitution and Civil Service Law grant a civil service employment preference, in the form of points added to examination scores, to New York residents who are honorably discharged veterans of the Armed Forces, served during time of war, and were New York residents when they entered military service. Appellee Army veterans, long-time New York residents, passed the New York City civil service examinations but were denied the veterans' preference because they were not New York residents when they joined the Army. They then brought an action in Federal District Court, alleging that the requirement that they have been New York residents when they joined the military violated the Equal Protection Clause of the Fourteenth Amendment and their constitutional right to travel. The District Court dismissed the complaint. The Court of Appeals reversed.

Held: The judgment is affirmed.

755 F. 2d 266, affirmed.

JUSTICE BRENNAN, joined by JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE POWELL, concluded that the prior resident requirement of the New York civil service veterans' preference laws violates appellees' constitutionally protected right to travel and to equal protection of the law. Pp. 901–912.

(a) The right to travel includes the freedom to enter and reside in any State, and a state law implicates that right when it actually deters such travel, when impeding travel is its primary objective, or when, as here, it uses a classification that penalizes the exercise of that right. When the latter is involved, heightened scrutiny of the law is required to determine its constitutionality, and the State must come forward with a compelling justification. Pp. 901–906.

(b) New York has not met its burden of proving that it has selected a means of pursuing a compelling state interest that does not impinge unnecessarily on constitutionally protected interests. The justifications offered in support of the prior residence requirement—encouraging New York residents to join the Armed Forces, helping war veterans reestablish themselves, inducing veterans to return to New York, and employing a "uniquely valuable class of public servants" who possess useful experience acquired through military service—fail to withstand heightened scrutiny. New York could accomplish these purposes without penalizing the right to travel by awarding special credits to all qualified veterans. Pp. 907-911.

CHIEF JUSTICE BURGER concluded that the New York prior residence requirement is invalid because it fails to meet the rational-basis test under the Equal Protection Clause. *Zobel* v. *Williams*, 457 U. S. 55; *Hooper* v. *Bernalillo County Assessor*, 472 U. S. 612. Pp. 912-916.

JUSTICE WHITE concluded that the New York prior residence requirement denies equal protection of the laws because the classification it employs is irrational. P. 916.

BRENNAN, J., announced the judgment of the Court and delivered an opinion, in which MARSHALL, BLACKMUN, and POWELL, JJ., joined. BURGER, C. J., *post*, p. 912, and WHITE, J., *post*, p. 916, filed opinions concurring in the judgment. STEVENS, J., filed a dissenting opinion, *post*, p. 916. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST and STEVENS, JJ., joined, *post*, p. 918.

Robert Hermann, Solicitor General of New York, argued the cause for appellant. With him on the brief were *Robert Abrams*, Attorney General, *pro se*, *O. Peter Sherwood*, Deputy Solicitor General, and *Christopher Keith Hall*, Assistant Attorney General.

Kenneth Kimerling argued the cause for appellees. With him on the brief was *Juan Cartagena*.*

JUSTICE BRENNAN announced the judgment of the Court and delivered an opinion, in which JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE POWELL join.

The question presented by this appeal is whether a preference in civil service employment opportunities offered by the State of New York solely to resident veterans who lived in the State at the time they entered military service violates the constitutional rights of resident veterans who lived outside the State when they entered military service.

**M. Carolyn Cox* and *Barton F. Stichman* filed a brief for Vietnam Veterans of America as *amicus curiae* urging affirmance.

I

The State of New York, through its Constitution, N. Y. Const., Art. V, § 6, and its Civil Service Law, N. Y. Civ. Serv. Law § 85 (McKinney 1983 and Supp. 1986), grants a civil service employment preference, in the form of points added to examination scores, to New York residents who are honorably discharged veterans of the United States Armed Forces, who served during time of war, and who were residents of New York when they entered military service.[1] This preference may be exercised only once, either for original hiring or for one promotion. N. Y. Const., Art. V, § 6.

Appellees, Eduardo Soto-Lopez and Eliezer Baez-Hernandez, are veterans of the United States Army and long-time residents of New York. Both men claim to have met all the eligibility criteria for the New York State civil service preference except New York residence when they entered the Army. Both Soto-Lopez and Baez-Hernandez passed New York City civil service examinations, but were denied the veterans' preference by the New York City Civil Service Commission because they were residents of Puerto Rico at the time they joined the military. Appellees sued the city in Federal District Court, alleging that the requirement of residence when they joined the military violated the Equal Protection Clause of the Fourteenth Amendment and the constitutionally protected right to travel. The Attorney General of the State of New York intervened as a defendant.

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[1] New York Constitution, Art. V, § 6, provides:

"Appointments and promotions in the civil service of the state and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination, which, as far as practicable, shall be competitive; provided, however, that any member of the armed forces of the United States who served therein in time of war, who is a citizen and resident of this state and was a resident at the time of his entrance into the armed forces of the United States and was honorably discharged or released under honorable circumstances from such service, shall be entitled to receive five points additional credit in a competitive examination for original appointment and two and one-half points additional credit in an examination for promotion or, if such member was disabled in the actual performance of duty in any war . . . he shall be entitled to receive ten points additional credit in a competitive examination for original appointment and five points additional credit in an examination for promotion. . . . No such member shall receive the additional credit granted by this section after he has received one appointment, either original entrance or promotion, from an eligible list on which he was allowed the additional credit granted by this section."

New York Civ. Serv. Law § 85 essentially restates the substance of the constitutional provision and defines the relevant terms.

The District Court dismissed appellees' complaint, holding that this Court's summary affirmance in *August* v. *Bronstein*, 417 U. S. 901 (1974), aff'g 369 F. Supp. 190 (SDNY), a case in which a three-judge panel upheld against equal protection and right-to-travel challenges the same sections of the New York State Constitution and Civil Service Law at issue in the instant action, compelled that result. The Court of Appeals for the Second Circuit reversed. *Soto-Lopez* v. *New York City Civil Service Comm'n*, 755 F. 2d 266 (1985). It concluded that *August*, *supra*, had implicitly been overruled by our more recent decision in *Zobel* v. *Williams*, 457 U. S. 55 (1982), and held that the prior residence requirement of the New York civil service preference offends both the Equal Protection Clause and the right to travel. The Court of Appeals remanded with various instructions, including the direction that the District Court permanently enjoin the defendants from denying bonus points to otherwise qualified veterans who were not residents of New York at the time they entered the military service. We noted probable jurisdiction of this appeal of the Attorney General of New York. 473 U. S. 903 (1985). We affirm.

II

"'[F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution.'" *Dunn* v. *Blumstein*, 405 U. S. 330, 338 (1972) (quoting *United States* v. *Guest*, 383 U. S. 745, 758 (1966)). See, *e. g.*, *Passenger Cases*, 7 How. 283, 492 (1849) (Taney, C. J., dissenting); *Crandall* v. *Nevada*, 6 Wall. 35, 43–44 (1868); *Paul* v. *Virginia*, 8 Wall. 168, 180 (1869); *Edwards* v. *California*, 314 U. S. 160 (1941); *Kent* v. *Dulles*, 357 U. S. 116, 126 (1958); *Shapiro* v. *Thompson*, 394 U. S. 618, 629–631, 634 (1969); *Oregon* v. *Mitchell*, 400 U. S. 112, 237 (1970) (separate opinion of BRENNAN, WHITE, and MARSHALL, JJ.); *id.*, at 285–286 (Stewart, J., concurring in part and dissenting in part, with whom BURGER, C. J., and BLACKMUN, J., joined); *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250, 254 (1974). And, it is clear that the freedom to travel includes the "'freedom to enter and abide in any State in the Union.'" *Dunn*, *supra*, at 338 (quoting *Mitchell*, *supra*, at 285).

The textual source of the constitutional right to travel, or, more precisely, the right of free interstate migration, though, has proved elusive. It has been variously assigned to the Privileges and Immunities Clause of Art. IV, see, *e. g.*, *Zobel*, *supra*, at 71 (O'CONNOR, J., concurring in judgment), to the Commerce Clause, see *Edwards* v. *California*, 314 U. S., at 173–174, and to the Privileges and Immunities Clause of the Fourteenth Amendment, see, *e. g.*, *id.*, at 177–178 (Douglas, J., concurring). The right has also been inferred from the federal structure of government adopted by our Constitution. *Zobel*, *supra*, at 67 (BRENNAN, J., concurring); *Shapiro*, *supra*, at 631; *United States* v. *Guest*, *supra*, at 757–758. However, in light of the unquestioned historic acceptance of the principle of free interstate migration, and of the important role that principle has played in transforming many States into a single Nation, we have not felt impelled to locate this right definitively in any particular constitutional provision.[2] *Shapiro*, *supra*, at 630.

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[2] As was observed in *Zobel* v. *Williams*, 457 U. S. 55, 67 (1982) (BRENNAN, J., concurring):

"[It] is clear from our cases [that] the right to travel achieves its most forceful expression in the context of equal protection analysis. But if, finding no citable passage in the Constitution to assign as its source, some

Whatever its origin, the right to migrate is firmly established and has been repeatedly recognized by our cases. See, *e. g.*, *Hooper* v. *Bernalillo County Assessor*, 472 U. S. 612, 618, n. 6 (1985); *Zobel, supra,* at 60, n. 6; *Jones* v. *Helms*, 452 U. S. 412, 418 (1981); *Memorial Hospital* v. *Maricopa County, supra; Dunn, supra; Shapiro, supra; United States* v. *Guest, supra,* at 757–759.

A state law implicates the right to travel when it actually deters such travel, see, *e. g.*, *Crandall* v. *Nevada, supra,* at 46; see also *Shapiro, supra,* at 629, when impeding travel is its primary objective, see *Zobel, supra,* at 62, n. 9; *Shapiro, supra,* at 628–631, or when it uses "'any classification which serves to penalize the exercise of that right.'" *Dunn, supra,* at 340 (quoting *Shapiro, supra,* at 634). Our right-to-migrate cases have principally involved the latter, indirect manner of burdening the right. More particularly, our recent cases have dealt with state laws that, by classifying residents according to the time they established residence, resulted in the unequal distribution of rights and benefits among otherwise qualified bona fide residents.[3] *Hooper,*

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might be led to question the independent vitality of the principle of free interstate migration, I find its unmistakable essence in that document that transformed a loose confederation of States into one Nation."

[3] We have always carefully distinguished between bona fide residence requirements, which seek to differentiate between residents and nonresidents, and residence requirements, such as durational, fixed date, and fixed point residence requirements, which treat established residents differently based on the time they migrated into the State. See, *e. g.*, *Martinez* v. *Bynum*, 461 U. S. 321, 325–330 (1983); *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250, 255, 267 (1974); *Dunn* v. *Blumstein*, 405 U. S. 330, 343 (1972); *Shapiro* v. *Thompson*, 394 U. S. 618, 636, 638, n. 21 (1969). As we explained in *Martinez:*

> "A bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents. Such a requirement . . . [generally] does not burden or penalize the constitutional right of interstate travel, for any person is free to move to a State and to establish residence there. A bona fide residence requirement simply requires that

supra; Zobel v. *Williams*, 457 U. S. 55 (1982); *Sosna* v. *Iowa*, 419 U. S. 393 (1975); *Memorial Hospital, supra; Dunn* v. *Blumstein*, 405 U. S. 330 (1972); *Shapiro, supra.*

Because the creation of different classes of residents raises equal protection concerns, we have also relied upon the Equal Protection Clause in these cases. Whenever a state law infringes a constitutionally protected right, we undertake intensified equal protection scrutiny of that law. See, *e. g., Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 440 (1985); *Martinez* v. *Bynum*, 461 U. S. 321, 328, n. 7 (1983); *Plyler* v. *Doe*, 457 U. S. 202, 216–217, and n. 15 (1982); *Memorial Hospital, supra*, at 258, 262; *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 16, and n. 39, 30–32, 40 (1973); *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 101 (1972); *Dunn, supra*, at 335, 342; *Shapiro, supra*, at 634. Thus, in several cases, we asked expressly whether the distinction drawn by the State between older and newer residents burdens the right to migrate. Where we found such a burden, we required the State to come forward with a compelling justification. See, *e. g., Shapiro* v. *Thompson, supra; Dunn, supra; Memorial Hospital* v. *Maricopa County*, 415 U. S. 250 (1974). In other cases, where we concluded that the contested classifications did not survive even rational-basis scrutiny, we had no occasion to inquire whether enhanced scrutiny was appropriate. *Hooper, supra; Zobel, supra.* The analysis in all of these cases, however, is informed by the same guiding principle—the right to migrate protects residents of a State from being disadvantaged, or from being treated differently, simply because of the timing of their migration, from other similarly situated residents.[4] *Hooper*,

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the person *does* establish residence before demanding the services that are restricted to residents." 461 U. S., at 328–329.

[4] Of course, regardless of the label we place on our analysis—right to migrate or equal protection—once we find a burden on the right to migrate the standard of review is the same. Laws which burden that right must

supra, at 618, n. 6; *Zobel, supra,* at 60, n. 6; *Memorial Hospital, supra,* at 261; *Shapiro, supra,* at 629–631.

New York's eligibility requirements for its civil service preference conditions a benefit on New York residence at a particular past time in an individual's life. It favors those veterans who were New York residents at a past fixed point over those who were not New York residents at the same point in their lives. Our cases have established that similar methods of favoring "prior" residents over "newer" ones, such as limiting a benefit to those who resided in the State by a fixed past date, *Hooper, supra;* granting incrementally greater benefits for each year of residence, *Zobel, supra;* and conditioning eligibility for certain benefits on completion of a fixed period of residence, see, *e. g., Memorial Hospital, supra; Dunn* v. *Blumstein, supra; Shapiro, supra,* warrant careful judicial review.[5] But, our cases have also established that only where a State's law "'operates to penalize those persons . . . who have exercised their constitutional right of interstate migration'" is heightened scrutiny triggered. *Memorial Hospital, supra,* at 258, quoting *Oregon*

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be necessary to further a compelling state interest. See, *e. g., Memorial Hospital, supra; Dunn, supra; Shapiro, supra.*

[5] We have cautioned, however, that not all waiting periods are impermissible. See, *e. g., Memorial Hospital, supra,* at 258–259; *Shapiro, supra,* at 638, n. 21. Indeed, in *Sosna* v. *Iowa,* 419 U. S. 393 (1975), we upheld a 1-year residency condition for maintaining an action for divorce. We noted the State's strong, traditional interest in setting the terms of and procedures for marriage and divorce. Weighing the fact that appellant's access to the desired state procedure was only temporarily delayed, against the State's important interest, we concluded that her right to migrate was not violated.

We have also sustained domicile requirements, which incorporated 1-year waiting periods, for resident tuition at state universities. *Starns* v. *Malkerson,* 401 U. S. 985 (1971), summarily aff'g 326 F. Supp. 234 (Minn. 1970) (three-judge court); *Sturgis* v. *Washington,* 414 U. S. 1057 (1973), summarily aff'g 368 F. Supp. 38 (WD Wash.) (three-judge court). See also *Vlandis* v. *Kline,* 412 U. S. 441, 452–454 (1973).

v. *Mitchell*, 400 U. S., at 238 (separate opinion of BRENNAN, WHITE, and MARSHALL, JJ.).

Our task in this case, then, is first to determine whether New York's restriction of its civil service preference to veterans who entered the Armed Forces while residing in New York operates to penalize those persons who have exercised their right to migrate. If we find that it does, appellees must prevail unless New York can demonstrate that its classification is necessary to accomplish a compelling state interest. *Memorial Hospital*, *supra*, at 262; *Dunn*, *supra*, at 342; *Shapiro*, 394 U. S., at 634.[6]

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[6] In his concurrence, THE CHIEF JUSTICE takes us to task for asking in the first instance what is the appropriate standard of review to employ in evaluating New York's laws. THE CHIEF JUSTICE argues that we should initially run the laws through a rational-basis analysis and then, if they survive that level of scrutiny, ask whether a higher level is appropriate.

We disagree. The logical first question to ask when presented with an equal protection claim, and the one we usually ask first, is what level of review is appropriate. See, *e. g.*, *Dunn*, 405 U. S., at 335 ("In considering laws challenged under the Equal Protection Clause . . . [f]irst . . . we must determine what standard of review is appropriate"). See also, *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432 (1985); *Mississippi University for Women* v. *Hogan*, 458 U. S. 718 (1982); *Plyler* v. *Doe*, 457 U. S. 202 (1982); *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250 (1974); *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1 (1973); *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92 (1972); *Shapiro* v. *Thompson*, 394 U. S. 618 (1969). It is well established that where a law classifies by race, alienage, or national origin, and where a law classifies in such a way as to infringe constitutionally protected fundamental rights, heightened scrutiny under the Equal Protection Clause is required. See, *e. g.*, *Cleburne*, *supra*, at 440; *Martinez*, 461 U. S., at 328, n. 7; *Plyler* v. *Doe*, *supra*, at 216–217, and n. 15; *Memorial Hospital*, *supra*, at 258, 262; *San Antonio Independent School District*, *supra*, at 16, and nn. 39, 30–32, 40; *Mosley*, *supra*, at 101; *Dunn*, *supra*, at 335, 342; *Shapiro*, *supra*, at 634. In the instant case, appellees contend not only that the laws in question treat them differently from another class of state residents, they also maintain that by treating them differently, the laws burden their constitutionally protected right to travel. Therefore, in order to ascertain the ap-

III

A

In previous cases, we have held that even temporary deprivations of very important benefits and rights can operate to penalize migration. For example, in *Shapiro* and in *Memorial Hospital*, we found that recently arrived indigent residents were deprived of life's necessities by durational residence requirements for welfare assistance and for free, nonemergency medical care, respectively, which were available to other poor residents. In *Dunn*, we held that new residents were denied a basic right by a durational residence requirement for establishing eligibility to vote. The fact that these deprivations were temporary did not offset the Court's conclusions that they were so severe and worked such serious inequities among otherwise qualified residents that they effectively penalized new residents for the exercise of their rights to migrate.

More recently, in *Hooper* v. *Bernalillo*, 472 U. S. 612 (1985), and *Zobel* v. *Williams*, 457 U. S. 55 (1982), we struck down state laws that created permanent distinctions among residents based on the length or timing of their residence in the State. At issue in *Hooper* was a New Mexico statute that granted a tax exemption to Vietnam veterans who resided in the State before May 8, 1976. *Zobel* concerned an Alaska statute granting residents one state mineral income dividend unit for each year of residence subsequent to 1959. Because we employed rational-basis equal protection analysis in those cases, we did not face directly the question whether

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propriate level of scrutiny, we must, as an initial matter, determine whether or not the State's laws actually burden appellees' right to travel.

It is true, as THE CHIEF JUSTICE suggests, that in *Hooper* v. *Bernalillo County Assessor*, 472 U. S. 612 (1985), and *Zobel* v. *Williams*, 457 U. S. 55 (1982), the Court did not follow this same logical sequence of analysis. We think that the better approach is that which the Court has employed in other equal protection cases—to inquire first as to the proper level of scrutiny and then to apply it.

the contested laws operated to penalize interstate migration. Nonetheless, the conclusion that they did penalize migration may be inferred from our determination that "the Constitution will not tolerate a state benefit program that 'creates fixed, permanent distinctions . . . between . . . classes of concededly bona fide residents, based on how long they have been in the State.'" *Hooper, supra,* at 623 (quoting *Zobel, supra,* at 59). See also *Zobel, supra,* at 64.

Soto-Lopez and Baez-Hernandez have been denied a significant benefit that is granted to all veterans similarly situated except for State of residence at the time of their entry into the military. While the benefit sought here may not rise to the same level of importance as the necessities of life and the right to vote, it is unquestionably substantial. The award of bonus points can mean the difference between winning or losing civil service employment, with its attendant job security, decent pay, and good benefits.[7] Brief for Appellees 27–28. See also *Guardians Assn. of New York City*

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[7] In *Andrade* v. *Nadel,* 477 F. Supp. 1275, 1279 (SDNY 1979), the Deputy Director of the New York City Department of Personnel testified:

"[O]n most civil service examinations, there is a pronounced 'bunching' (*i. e.,* a large percentage of the test takers obtain very similar scores). [I]t can be assumed that rescission of the five or 10 point veterans' preference in the case of most of 1,300 employee [veterans receiving probationary appointments in New York City in a specific year would] result in their receiving a list number that has not yet been reached for appointment, and . . . consequently [in their losing] their jobs."

Appellees contend that this "bunching" phenomenon adversely affected their employment opportunities with the City of New York. For example, after passing a New York City civil service examination, Baez-Hernandez was preliminarily awarded 10 veterans' bonus points—5 for veteran status, and 5 for his service-related disability, bringing his total score to 87.3. Based on this adjusted score, he received an appointment with the city in June 1981. The award of the 10 bonus points was rescinded two days later, however, and the appointment withdrawn when it was discovered that Baez-Hernandez was not a New York resident at the time of his entry into the Army. *Soto-Lopez* v. *New York City Civil Service Comm'n,* 755 F. 2d 266, 268–269 (CA2 1985).

Police Dept., Inc. v. *Civil Service Comm'n,* 630 F. 2d 79, 85 (CA2 1980), cert. denied, 452 U. S. 940 (1981); *Andrade* v. *Nadel,* 477 F. Supp. 1275, 1279 (SDNY 1979). Furthermore, appellees have been *permanently* deprived of the veterans' credits that they seek. As the Court of Appeals observed: "The veteran's ability to satisfy the New York residence requirement is . . . fixed. He either was a New York resident at the time of his initial induction or he was not; he cannot earn a change in status." 755 F. 2d, at 275. Such a permanent deprivation of a significant benefit, based only on the fact of nonresidence at a past point in time, clearly operates to penalize appellees for exercising their rights to migrate.

B

New York offers four interests in justification of its fixed point residence requirement: (1) the encouragement of New York residents to join the Armed Services; (2) the compensation of residents for service in time of war by helping these veterans reestablish themselves upon coming home; (3) the inducement of veterans to return to New York after wartime service; and (4) the employment of a "uniquely valuable class of public servants" who possess useful experience acquired through their military service. Brief for Appellant 15. All four justifications fail to withstand heightened scrutiny on a common ground—each of the State's asserted interests could be promoted fully by granting bonus points to *all* otherwise qualified veterans. New York residents would still be encouraged to join the services. Veterans who served in time of war would be compensated. And, both former New Yorkers and prior residents of other States would be drawn to New York after serving the Nation, thus providing the State with an even larger pool of potentially valuable public servants.

As we held in *Dunn:* "[I]f there are other, reasonable ways to achieve [a compelling state purpose] with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" 405 U. S., at 343 (quoting *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960)). See also *Memorial Hospital*, 415 U. S., at 263. Because New York could accomplish its purposes without penalizing the right to migrate by awarding special credits to all qualified veterans, the State is not free to promote its interests through a preference system that incorporates a prior residence requirement.

Two of New York's asserted interests have additional weaknesses. First, the availability of the preference to *inductees* as well as *enlistees* undercuts the State's contention that one of the most important purposes of the veterans' credit is to encourage residents to *enlist* in the services. Second, the fact that eligibility for bonus points is not limited to the period immediately following a veteran's return from war casts doubt on New York's asserted purpose of easing the transition from wartime military conditions to civilian life,[8] for, presumably, a veteran of the Korean War could take a civil service examination and receive the bonus points tomorrow, 30 years after his homecoming. Cf. *Hooper*, 472 U. S., at 621. The State's failure to limit the credit to enlistees recently returned to New York from war strongly suggests that the State's principal interest is simply in rewarding its residents for service to their country.

Compensating veterans for their past sacrifices by providing them with advantages over nonveteran citizens is a longstanding policy of our Federal and State Governments. See, *e. g., Hooper, supra; Regan* v. *Taxation with Representation of Washington*, 461 U. S. 540, 551 (1983); *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S. 256, 279, n. 25

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[8] Moreover, it is difficult to understand why veterans who joined the military as New York residents would have so much more trouble effecting this transition than other veterans that New York is justified in reserving "the benefits [it] bestows for national military service" for only one class of resident veterans. *Hooper* v. *Bernalillo County Assessor*, 472 U. S., at 621.

(1979). Nonetheless, this policy, even if deemed compelling, does not support a distinction between resident veterans based on their residence when they joined the military. Members of the Armed Forces serve the Nation as a whole. While a serviceperson's home State doubtlessly derives indirect benefit from his or her service, the State benefits equally from the contributions to our national security made by other service personnel. "Permissible discriminations between persons" must be correlated to "their *relevant* characteristics." *Zobel*, 457 U. S., at 70 (BRENNAN, J., concurring). Because prior residence has only a tenuous relation, if any, to the benefit New York receives from all Armed Forces personnel, the goal of rewarding military service offers no support for New York's fixed point residence requirement.

IV

In sum, the provisions of New York's Constitution, Art. V, §6, and Civil Service Law §85, which limit the award of a civil service employment preference to resident veterans who lived in New York at the time they entered the Armed Forces, effectively penalize otherwise qualified resident veterans who do not meet the prior residence requirement for their exercise of the right to migrate. The State has not met its heavy burden of proving that it has selected a means of pursuing a compelling state interest which does not impinge unnecessarily on constitutionally protected interests. Consequently, we conclude that New York's veterans' preference violates appellees' constitutionally protected rights to migrate and to equal protection of the law.

Once veterans establish bona fide residence in a State, they "become the State's 'own' and may not be discriminated against solely on the basis of [the date of] their arrival in the State." *Hooper*, *supra*, at 623. See also *Vlandis* v. *Kline*, 412 U. S. 441, 449–450, and n. 6 (1973); *Shapiro*, 394 U. S., at 632–633; *Passenger Cases*, 7 How., at 492 (Taney, C. J., dissenting). For as long as New York chooses to offer its resident veterans a civil service employment preference, the Constitution requires that it do so without regard to residence at the time of entry into the services.[9] Accordingly, the judgment of the Court of Appeals is

Affirmed.

CHIEF JUSTICE BURGER, concurring in the judgment.

In this case the Court of Appeals held that New York's civil service veterans' preference violated both equal protection and the right to travel, relying on *Zobel* v. *Williams*, 457 U. S. 55 (1982). Shortly after the Court of Appeals' decision was issued, we struck down New Mexico's property tax veterans' preference in *Hooper* v. *Bernalillo County Assessor*, 472 U. S. 612 (1985). Both *Zobel* and *Hooper* held that the classifications used by the States to award preferences to certain citizens failed to pass a rational-basis test *under the Equal Protection Clause*. As a result, we had no occasion to reach the issues whether the classifications would survive heightened scrutiny or whether the right to travel was violated. See *Hooper*, *supra*, at 618, and n. 6; *Zobel*, *supra*, at 60–61, and n. 6.

The classification held invalid on equal protection grounds in *Hooper* was remarkably similar to the one at issue here; *Hooper*, therefore, would appear to be controlling. The plurality opinion, however, instead *begins* the analysis by addressing the "right to migrate." *Ante*, at 901–905. Moreover, heightened scrutiny is employed without first determining whether the challenged New York classification would survive even rational-basis analysis. *Ante*, at 907–909. But as we observed in *Zobel*, *supra*, at 60, n. 6, and reiterated only last Term in *Hooper*, *supra*, at 618, n. 6, "[r]ight to travel cases have examined, in equal protection terms, state distinctions between newcomers and longer term residents." This follows because "[i]n reality, right to travel analysis refers to little more than a particular application of equal protection analysis." *Zobel*, *supra*, at 60, n. 6.

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[9] Our summary affirmance in *August* v. *Bronstein*, 417 U. S. 901 (1974), is hereby overruled.

I believe the appropriate framework for reviewing New York's preference scheme is the one dictated by *Zobel* and followed in *Hooper*—both very recent cases. Because "[t]his case involves a distinction between residents based on when they first established residence in the State," just as in *Hooper*, "we [must] subject this case to equal protection analysis." *Hooper*, 472 U. S., at 618, n. 6. The first question is whether the law survives rational-basis analysis under the Equal Protection Clause. "[I]f the statutory scheme cannot pass even the minimum rationality test, our inquiry ends." *Id.*, at 618. Under *Hooper*, it seems clear that New York's provision is invalid on equal protection grounds.

The State proffers four justifications for the challenged classification. First, it claims that the preference system encourages New York residents to enlist during times of war. This justification rests entirely on the State's characterization of the preference as being *prospective* and self-executing in nature. But plainly the preference is granted only *retrospectively* following definitive action by the legislature; legislative action is necessary to fix both the period when "war" is deemed to have commenced and when that war has ended.

In many cases a New York resident entering military service will have no idea whether he or she will be entitled to the preference following a successful tour of duty and honorable discharge. For example, the beginning of the Vietnam era was established by legislation as a "time of war" some three years *after* hostilities commenced. The legislature in 1973 later declared the "end" of that "war" (which was never declared a "war" by Congress) for purposes of the preference as March 29, 1973, but in 1983 it amended that finding to expand coverage retroactively again until May 7, 1975. See Brief for Appellant 9–10. The same happened in the Korean Conflict, and indeed, the provision at issue was adopted after the end of World War II with the clear intent to grant the benefit retroactively to veterans of that war. *Id.*, at 7–8.

Moreover, the preference applies to *all* servicemen entering the military during the legislatively defined period, regardless of whether they enlisted voluntarily or were inducted as a result of the draft. Providing a "bonus" to draftees is hardly a boon intended or necessary to "encourage" them to enlist. Hence, this "encouragement to enlist" sharply "differs from the local 'bounty' laws enacted during the Civil War era, through which States paid residents cash bonuses for enlisting." *Hooper*, 472 U. S., at 622, n. 12.

Second, the State argues that the preference provides partial compensation to residents for service during time of war. But our holding in *Hooper* clearly rejected any such retroactive rewards targeting only past residents. While we acknowledged that a "State may award certain benefits to all its bona fide veterans," *id.*, at 620, just as in that case "it is difficult to grasp how [New York] residents serving in the military suffered more than residents of other States who served, so that the latter would not deserve the benefits a State bestows for national military service." *Id.*, at 621.

Third, the State contends that it is permissible to encourage past-resident veterans to settle in New York after their military service ends. While such a preference might indeed encourage such veterans to return, it simultaneously has the effect of *discouraging* other veterans from settling in New York who are aware that civil service appointments will be hard to obtain. As we observed in *Zobel* and reiterated in *Hooper*, *supra*, at 619–620, "[t]he separation of residents into classes hardly seems a likely way to persuade new [residents] that the State welcomes them and wants them to stay." *Zobel*, *supra*, at 62, n. 9. Moreover, *Hooper* made it clear that a "selective incentive" such as New York provides here "would encounter the same constitutional barrier faced by the [New Mexico] statute's distinction between past and newly arrived residents." *Hooper, supra,* at 619, n. 8.

Finally, the State asserts that the preference is targeted at a very special group of veterans who have both knowledge of local affairs and valuable skills learned in the military, and who therefore would make exceptional civil servants. But these "special attributes" are undeniably possessed by *all* veterans who are currently residents of New York.

Indeed, the irrationality of the New York scheme is highlighted by appellee Baez-Hernandez' experiences. The current provision would grant a civil service hiring preference to a serviceman entering the military while a resident of New York even if he was a resident only for a day. But Baez-Hernandez, who was a resident of New York for over 10 years before applying for a civil service position—and who therefore has considerably more "local knowledge" than many returning veterans—can never receive the preference. Moreover, Baez-Hernandez was a resident of New York for two years when he was called from reserve status to active duty, where he remained until he was discharged as partially disabled. He therefore served "in time of war" *after* obtaining New York residency. Yet he still cannot qualify despite his being endowed with all the desired "special attributes."

Just as in *Hooper*, "[s]tripped of its asserted justifications, the [New York] statute suffers from the same constitutional flaw as the Alaska statute in *Zobel*." 472 U. S., at 622. Given our reasons for granting review, our admonition in *Hooper* need only be reiterated briefly to demonstrate the invalidity of the New York scheme under equal protection, rational-basis analysis:

> "The State may not favor established residents over new residents based on the view that the State may take care of 'its own,' if such is defined by prior residence. Newcomers, by establishing bona fide residence in the State, become the State's 'own' and may not be discriminated

> against solely on the basis of their arrival in the State after [a fixed date]." *Id.*, at 623.

Appellees Soto-Lopez and Baez-Hernandez, by establishing bona fide residence in New York, have become the State's "own" and must be treated accordingly with regard to any veterans' preference. "Neither the Equal Protection Clause, nor this Court's precedents, permit the State to prefer established resident veterans over newcomers in the retroactive apportionment of an economic benefit." *Ibid.*

I would affirm the judgment of the Court of Appeals based on our reasoning and holdings in *Hooper* and *Zobel*, rather than adding dicta concerning the right to travel.

JUSTICE WHITE, concurring in the judgment.

I agree with JUSTICE O'CONNOR that the right to travel is not sufficiently implicated in this case to require heightened scrutiny. Hence, I differ with JUSTICE BRENNAN in this respect. But I agree with THE CHIEF JUSTICE that the New York statute at issue denies equal protection of the laws because the classification it employs is irrational. I therefore concur in the judgment.

JUSTICE STEVENS, dissenting.

JUSTICE O'CONNOR has explained why the Court's decision is erroneous. I add these comments to explain why I do not feel constrained by the decision in *Hooper* v. *Bernalillo County Assessor*, 472 U. S. 612 (1985), to join the Court's judgment.

A governmental decision to grant a special privilege to a minority group is less objectionable than a decision to impose a special burden on a minority.[1] In a democracy the majority will seldom treat itself unfairly. In equal protection analysis, it is therefore appropriate to give some attention to the relative dimensions of favored and disfavored classes.[2]

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[1] Cf. *Wygant* v. *Jackson Board of Education*, *ante*, at 316–317 (STEVENS, J., dissenting).

The New Mexico statute that the Court held invalid in *Hooper* gave a tax exemption to any Vietnam veteran who resided in New Mexico prior to May 8, 1976. The New York statute challenged in this case grants a preference only to those Vietnam veterans who were residents of the State when they joined the Armed Forces. The favored class in this case is therefore drawn more narrowly than the class that excluded Mr. Hooper. Despite the fact that the reasoning of the *Hooper* opinion might seem to cover this case as well, this distinction allows me to conclude otherwise for two reasons.

First, in its *Hooper* opinion the Court itself was careful to reserve the question of the constitutionality of the New York statute in particular, and of the class of statutes that condition eligibility for a veteran's preference on residence at the time of enlistment in general.[3] If the Court believed the reasoning of *Hooper* to be controlling in this case, it had only to omit its footnote in *Hooper* and to affirm rather than note jurisdiction in this case, as it subsequently did. The Court cannot both leave a question open in order to make its *Hooper* decision acceptable to a majority of its Members and at the same time claim that the *Hooper* holding has resolved the open question.

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[2] See *Hooper* v. *Bernalillo County Assessor*, 472 U. S. 612, 629–630 (1985) (STEVENS, J., dissenting); *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S. 256, 281 (1979) (STEVENS, J., concurring). Cf. *Craig* v. *Boren*, 429 U. S. 190, 213–214 (1976) (STEVENS, J., concurring).

[3] "Veterans' benefit statutes, which condition eligibility on state residence at the time of induction into the military, have survived challenges under the Equal Protection Clause before *Zobel* was decided. See, *e. g.*, . . . *August* v. *Bronstein*, 369 F. Supp. 190 (SDNY), summarily aff'd, 417 U. S. 901 (1974) . . . .

". . . [We note that] the Second Circuit recently has ruled that such a statute could not pass muster under the Equal Protection Clause in light of the Court's holding in *Zobel* [v. *Williams*, 457 U. S. 55 (1982)]. *Soto-Lopez* v. *New York City Civil Service Comm'n*, 755 F. 2d 266 (1985), appeal docketed, No. 84–1803. Given the circumstances presented in this case, we need not consider here the constitutionality of these statutes." *Hooper* v. *Bernalillo County Assessor*, 472 U. S., at 621–622, n. 11.

Second, and of greater importance, each additional condition of eligibility that further narrows the size of the preferred class places greater stress on the logic that undergirds the Court's holding. If a State should grant a special bonus to fighter pilots who are residents at the time of enlistment, to those who fought in the Battle of Midway, or perhaps just to the few who received the Congressional Medal of Honor—would it violate the Equal Protection Clause to deny bonuses to comparable veterans who moved into the State after the end of the war? I think not, even though the reasoning in the opinions supporting the judgment would apply to each of those cases as well as it does to *Hooper* and to this case. As the class narrows, a judge is surely not bound to apply that flawed reasoning in each successive case instead of using each new extension to explain why the Court is marching in the wrong direction.

I respectfully dissent.

JUSTICE O'CONNOR, with whom JUSTICE REHNQUIST and JUSTICE STEVENS join, dissenting.

The Court today holds unconstitutional the preference in public employment opportunities New York offers to resident wartime veterans who resided in New York when they entered military service. Because I believe that New York's veterans' preference scheme is not constitutionally offensive under the Equal Protection Clause, does not penalize some free-floating "right to migrate," and does not violate the Privileges and Immunities Clause of Art. IV, §2, of the Constitution, I dissent.

I

The plurality's constitutional analysis runs generally as follows: because the classification imposed by New York's limited, one-time veterans' civil service preference "penalizes" appellees' constitutional "right to migrate," the preference program must be subjected to heightened scrutiny, which it does not survive because it is insufficiently narrowly tailored to serve its asserted purposes. On the strength of this reasoning, the plurality concludes that the preference program violates both appellees' constitutional "right to migrate" and their right to equal protection of the law, see *ante,* at 911, although it does not make clear how much of its analysis is necessary or sufficient to find a violation of the "right to migrate" independently of an Equal Protection Clause violation.

In pursuing this new dual analysis, the plurality simply rejects the equal protection approach the Court has previously employed in similar cases, see, *e. g., Hooper* v. *Bernalillo County Assessor,* 472 U. S. 612 (1985), without bothering to explain why its novel use of both "right to migrate" analysis and strict equal protection scrutiny is more appropriate, necessary or doctrinally coherent. Cf. *Jones* v. *Helms,* 452 U. S. 412, 426–427 (1981) (WHITE, J., concurring). Indeed, the plurality does not even feel "impelled to locate ['the right to migrate'] definitively in any particular constitutional provision," despite the fact that its ruling rests in major part on its determination that the preference scheme penalizes that right. See *ante,* at 902, 907–911, and n. 4. The plurality's refusal to amplify its opinion further is even more remarkable given that the Court is overturning the very provisions of New York's Constitution and its Civil Service Law which it upheld against the same challenges just 12 years ago. See *August* v. *Bronstein,* 369 F. Supp. 190 (SDNY), summarily aff'd, 417 U. S. 901 (1974).

THE CHIEF JUSTICE finds it unnecessary to address the proper analytical role of the "right to travel" in this case because he believes that the New York scheme cannot survive rational basis scrutiny purely as a matter of equal protection law. See *ante,* at 913, 916. Yet THE CHIEF JUSTICE's position depends in part on the assumption that New York's desire "to reward citizens for past contributions . . . is not a legitimate state purpose," *Zobel* v. *Williams,* 457 U. S. 55, 63 (1982). See *ante,* at 914. This assumption is not required by anything in the Equal Protection Clause; rather, "a full reading of *Shapiro* v. *Thompson*, 394 U. S. 618 (1969), and *Vlandis* v. *Kline*, 412 U. S. 441 (1973), reveals [that] the Court has rejected this objective only when its implementation would abridge an interest in interstate travel or migration." *Zobel* v. *Williams*, *supra*, at 72 (O'CONNOR, J., concurring in judgment).

It is unfortunate that the Court has once again failed to articulate and justify by reference to textual sources a single constitutional principle or analysis upon which it can rely in deciding cases such as this. I adhere to my belief that the Privileges and Immunities Clause of Art. IV, § 2, of the Constitution supplies the relevant basis for analysis in evaluating claims like appellees', where the principal allegation is that the state scheme impermissibly distinguishes between state residents, allegedly imposing a relative burden on those who have more recently exercised their right to establish residence in the State. See *Zobel* v. *Williams*, 457 U. S., at 74–75 (O'CONNOR, J., concurring in judgment). I also continue to believe that a State's desire to compensate its citizens for their prior contributions is "neither inherently invidious nor irrational," either under the Court's "right to migrate" or under some undefined, substantive component of the Equal Protection Clause. *Id.*, at 72. This case presents one of those instances in which the recognition of state citizens' past sacrifices constitutes a valid state interest that does not infringe any constitutionally protected interest, including the fundamental right to settle in another State which is protected by the Privileges and Immunities Clause of Art. IV, § 2. See *id.*, at 72, n. 1.

II

In my view, the New York veterans' preference scheme weathers constitutional scrutiny under any of the theories propounded by the Court. The plurality acknowledges that heightened scrutiny is appropriate only if the statutory classification "penalize[s]," "actually deters," or is primarily intended to "imped[e]" the exercise of the right to travel. See *ante,* at 903. In finding that the New York preference program imposes a "penalty" on appellees' right to migrate, the plurality likens the New York scheme to the permanent state property tax exemption for veterans struck down in *Hooper* v. *Bernalillo County Assessor, supra,* and the durational residency requirements for essential governmental services invalidated in *Memorial Hospital* v. *Maricopa County,* 415 U. S. 250 (1974), and *Shapiro* v. *Thompson, supra.*

This Court in *Memorial Hospital* acknowledged that *Shapiro* left unclear the amount of impact on the right to travel which is necessary to give rise to application of heightened scrutiny. See *Memorial Hospital* v. *Maricopa County, supra,* at 256–259. As the plurality implicitly recognizes, see *ante,* at 907–909, it is fair to infer that something more than a negligible or minimal impact on the right to travel is required before strict scrutiny is applied. I believe that, as the three-judge panel in *August* v. *Bronstein* put it, "the limited preference granted under the . . . New York law can[not] realistically be held to infringe or penalize the right to travel." 369 F. Supp., at 194.

The New York law certainly does not directly restrict or burden appellees' freedom to move to New York and to establish residence there by imposing discriminatory fees, taxes, or other direct restraints. Cf. *The Passenger Cases,* 7 How. 283 (1849). The New York preference program does not permanently deprive appellees of the right to participate in some fundamental or even "significant" activity, for "public employment is not a constitutional right . . . and the States have wide discretion in framing employee qualifications." *Personnel Administrator of Massachusetts* v. *Feeney,* 442 U. S. 256, 273 (1979). See also *Sosna* v. *Iowa,* 419 U. S. 393, 406 (1975). Cf. *Dunn* v. *Blumstein,* 405 U. S. 330, 336–337, 341 (1972). Nor does the program indirectly penalize migration by depriving the newcomers of fundamental rights or essential governmental services until they have resided in the State for a set period of time. Cf. *Memorial Hospital* v. *Maricopa County, supra; Dunn* v. *Blumstein, supra; Shapiro* v. *Thompson, supra.*

Finally, the New York scheme does not effectively penalize those who exercise their fundamental right to settle in the State of their choice by requiring newcomers to accept a status inferior to that of all oldtime residents of New York upon their arrival. Cf. *Zobel* v. *Williams, supra,* at 74 (O'CONNOR, J., concurring in judgment). Those veterans who were not New York residents when they joined the United States Armed Forces, who subsequently move to New York, and who endeavor to secure civil service employment are treated exactly the same as the vast majority of New York citizens; they are in no sense regarded as "second-class citizens" when compared with the vast majority of New Yorkers or even the majority of the candidates against whom they must compete in obtaining civil employment. Cf. *Hicklin* v. *Orbeck,* 437 U. S. 518 (1978). To the extent that persons such as appellees labor under any practical disability, it is a disability that they share in equal measure with countless other New York residents, including New York residents who joined the Armed Forces from New York but are ineligible for the veterans' preference for other reasons.

The only persons who arguably have an advantage based on their prior residency in New York in relation to persons in appellees' position are a discrete group of veterans who joined the Armed Forces while New York residents, who served during wartime, who returned to New York, and who elected to seek public employment. Even that group does not enjoy an unqualified advantage over appellees based on their prior residence. New York's veterans' preference scheme requires that veterans satisfy a number of preconditions, of which prior residency is only one, before they qualify for the preference. Moreover, the preference only increases the possibility of securing a civil service appointment; it does not guarantee it. Those newly arrived veterans who achieve a sufficiently high score on the exam may not be disadvantaged at all by the preference program; conversely, the chances of those who receive a very low score may not be affected by the fact that their competitors received bonus points. Finally, the bonus program is a one-time benefit. Veterans who join the service in New York, who satisfy the other statutory requirements, and who achieve a sufficiently high score on the exam to bring them within range of securing employment may only use the bonus points on one examination for appointment and in one job for promotion. Thus, persons such as appellees are not forced to labor under a "continuous disability" by comparison even to this discrete group of New York citizens. *Zobel* v. *Williams*, 457 U. S., at 75 (O'CONNOR, J., concurring in judgment).

Certainly the New York veterans' preference program imposes a less direct burden on a less "significant" interest than many resident-preference programs that this Court has upheld without difficulty. For example, this Court has summarily affirmed certain state residency requirements for state college tuition rates, *Sturgis* v. *Washington*, 414 U. S. 1057 (1973), and a limited eligibility statute in New York for scholarship assistance, *Spatt* v. *New York*, 414 U. S. 1058 (1973), even though those requirements constituted a potentially prohibitive burden on access to "important" educational opportunities. *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 31–32 (1973). The Court has also upheld a 1-year durational residence requirement for eligibility to obtain a divorce in state courts, *Sosna* v. *Iowa*, *supra*, even though the right to terminate a marriage has been deemed in some sense "fundamental." See *Boddie* v. *Connecticut*, 401 U. S. 371 (1971).

In sum, finding that this scheme in theory or practical effect constitutes a "penalty" on appellees' fundamental right to settle in New York or on their "right to migrate" seems to me ephemeral, and completely unnecessary to safeguard the constitutional purpose of "maintaining a Union rather than a mere 'league of States.'" *Zobel* v. *Williams*, *supra*, at 73 (O'CONNOR, J., concurring in judgment). See also *ante*, at 902 ("right to migrate" plays role of "transforming many States into a single Nation"). Thus, heightened scrutiny, either under the "right to migrate" or the Equal Protection Clause, see *ante*, at 904–905, n. 4, is inappropriate.

Under rational basis review, New York's program plainly passes constitutional muster. New York contends that its veterans' employment preference serves as an expression of gratitude to veterans who entered the service as New York residents. Even the plurality acknowledges the legitimacy of this state purpose. See *ante*, at 910. Indeed, it is difficult to impeach this interest, for "[o]ur country has a longstanding policy of compensating veterans for their past contributions by providing them with numerous advantages." *Regan* v. *Taxation with Representation of Washington*, 461 U. S. 540, 551 (1983). See also *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S., at 261. As JUSTICE STEVENS has explained, "the simple interest in expressing the majority's gratitude for services that often entail hardship, hazard, and separation from family and friends, and that may be vital to the continued security of our Nation, is itself an adequate justification for providing veterans with a tangible token of appreciation." *Hooper* v. *Bernalillo County Assessor*, 472 U. S., at 626 (dissenting). In sum, this state interest could hardly be deemed inherently invidious or irrational. Nor, as demonstrated by the above discussion, could it be said to be constitutionally offensive because its implementation has burdened a fundamental right to travel.

I have difficulty believing that the veterans' preference scheme employed by New York does not rationally relate to this legitimate state interest. I had certainly thought a State could award a medal to all New York veterans of designated wars, or that it could erect memorials in honor of certain residents returning from particular armed conflicts; it is hardly irrational to employ a means which gives certain returning wartime veterans a more tangible and useful expression of gratitude by way of employment preferences. I also find it hard to credit the idea that the Equal Protection Clause requires New York to reward the sacrifices of all those who joined the Armed Forces from other States and came to reside in New York if it wishes to reward the service of those who represented New York in the Armed Forces. Certainly those veterans who represented other States in the military aided New York by aiding the Nation, and suffered in equal measure with New York veterans, but that is not the issue. New York is not expressing gratitude for the prior resident's service to, and sacrifice for, the Nation as much as it is attempting to say "thank you" to those who personified New York's sacrifice and effort to "do its part" in supporting this Nation's war efforts. The prior residence of the individual seeking the statutory benefit clearly is a "relevant characteristic" to this legitimate and longstanding state interest and is one which has a manifest relation to the furtherance of that interest.

Whether this issue is tested under the "right to migrate," the Equal Protection Clause, or the Privileges and Immunities Clause of Art. IV, § 2, something more than the minimal effect on the right to travel or migrate that exists in this case must be required to trigger heightened scrutiny or the plurality's right to travel analysis will swallow all the traditional deference shown to state economic and social regulation. The modest scheme at issue here does not penalize in a constitutional sense veterans who joined the Armed Forces in other States for choosing to eventually settle in New York, and does not deny them equal protection. I would reverse the judgment of the Court of Appeals for the Second Circuit.

LYNG, SECRETARY OF AGRICULTURE, ET AL. *v.* PAYNE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 84–1948. Argued March 24, 1986—Decided June 17, 1986

Under the Consolidated Farm and Rural Development Act, the Secretary of Agriculture has authority to make emergency loans to farmers who suffer economic losses as a result of a natural disaster. Pursuant to a rule of the Farmers Home Administration (FmHA), the Secretary required loan applicants suffering from disasters occurring between December 26, 1972, and April 20, 1973, to file their applications by April 2, 1974. That rule embodied the command of Pub. L. 93–237 to keep such loan programs open at least until that date. During this period, loans were available on terms far more generous than under later versions of the authorizing statute. In 1976, a class action was instituted in Federal District Court, in which respondents represented farmers who had been eligible for loans during this period as the result of a Florida flood occurring in early April 1973, but who, because of lack of notice, had not been aware of their eligibility. It was alleged, *inter alia*, that the FmHA's failure to publicize the program more fully violated its own regulations, and an injunction was sought to require the FmHA to reopen the loan program. The District Court granted the requested relief, finding that the FmHA, in violation of one of its own regulations, had failed to give adequate notice of the availability of loans, and requiring the agency to reopen the program for the period from April 15, 1981, to June 15, 1981. The Court of Appeals affirmed on different grounds, holding that the FmHA had failed to comply with another regulation that required it to notify the public through the news media of the program's generous terms. After an earlier remand from this Court, the Court of Appeals adhered to its prior views and reinstated its decision, observing that petitioner Government officials' liability was premised on the FmHA's failure to follow its own regulations.

Held:

1. The lower courts erred in holding that the Secretary's conduct violated the notice procedures relevant to the implementation of Pub. L. 93–237. Accordingly, even assuming, *arguendo*, that reopening the loan program would have been an appropriate remedy had the relevant regulations been violated, awarding that relief was clearly improper in light of the FmHA's compliance with its own procedures. The agency's appli-

cable regulations provided for press releases to inform the news media of the "provisions of P. L. No. 93-237." Public Law 93-237 itself said nothing about the availability of the generous terms of the loan program, but merely stated that loans with respect to disasters occurring prior to April 20, 1973, would be administered under Pub. L. 92-385, and thus the statement in the FmHA's news releases that "loan applications will be taken under the terms of a new law (P. L. 93-237) enacted January 2, 1974," was no less informative than were the "provisions" of the Act the release was endeavoring to describe. And in light of the history of Pub. L. 93-237 and the regulatory history, the District Court's remedy cannot be supported on the theory that the FmHA violated its earlier notice requirements. Pp. 935-942.

2. Nor can the injunctive relief be supported on the theory that inadequate notice of the loan program deprived the respondents of property without due process of law. Even assuming that respondents had a legitimate claim of entitlement protected by due process, the notice published by the Secretary in the Federal Register after the enactment of Pub. L. 93-237, which notice set out in detail the terms and conditions of the loan program, as well as the notice afforded by the Secretary in full compliance with his own procedures, was more than ample to satisfy any due process concerns. Pp. 942-943.

751 F. 2d 1191, reversed.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 943.

Bruce N. Kuhlik argued the cause for petitioners. With him on the briefs were *Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Geller, Robert E. Kopp,* and *Richard A. Olderman.*

Theodore L. Tripp, Jr., argued the cause and filed a brief for respondents.

JUSTICE O'CONNOR delivered the opinion of the Court.

Federal law vests in the Secretary of Agriculture the authority to make emergency loans to farmers who suffer economic losses as a result of a natural disaster. See Consolidated Farm and Rural Development Act (Act), §§ 321-330, 75 Stat. 311, as amended, 7 U. S. C. §§ 1961-1971.

Pursuant to an agency rule, the Secretary required loan applicants suffering from disasters occurring between December 26, 1972, and April 20, 1973, to file their applications by April 2, 1974. 39 Fed. Reg. 7569 (1974) (later codified at 7 CFR § 1832.82(a) (1975)). That rule embodied a statutory command to keep the loan program open at least until that date. Pub. L. 93–237, 87 Stat. 1025. The question presented is whether a federal court has the remedial authority to reopen this long-terminated loan program on the basis of its finding that the Secretary, in alleged violation of another rule, failed adequately to notify affected farmers of the program's availability and terms.

I

In early April 1973 torrential rains struck 13 counties in the northern part of Florida. Initial estimates, which were later sharply reduced, projected that resulting crop and property losses would be in excess of $3 million. In light of the scope of these anticipated losses, on May 26, 1973, President Nixon declared the region a major disaster area. 38 Fed. Reg. 14800 (1973). See Disaster Relief Act of 1970, Pub. L. 91–606, 84 Stat. 1744 (repealed or transferred 1974). As a result of this declaration, the Secretary of Agriculture came under a statutory obligation to "make loans" to qualifying individuals in the region. 7 U. S. C. § 1961(b) (1970 ed., Supp. III).

At the time of the declaration, the federal disaster relief program, like much of the rest of the Federal Government, had become embroiled in a budgetary dispute between the Executive and Legislative Branches. In 1972, Congress had passed Pub. L. 92–385, 86 Stat. 554, which authorized emergency loans under terms far more generous than those available under later versions of the Act. Under the 1972 law as implemented by the Secretary, loans carried a 1% interest rate and were not conditioned upon the unavailability of alternative sources of credit. In addition, the Secretary was directed to forgive outright up to $5,000 of the principal of the loan. On December 27, 1972, as part of a larger, administrationwide effort to control what were viewed as excessive congressional appropriations, the Secretary directed that regional Farmers Home Administration (FmHA) officials effectively cease processing loan applications. See generally *Berends* v. *Butz,* 357 F. Supp. 143 (Minn. 1973); Impoundment of Appropriated Funds by the President: Joint Hearings before the Ad Hoc Subcommittee on Impoundment of Funds of the Senate Committee on Government Operations of the Senate Committee on the Judiciary, 93d Cong., 1st Sess., 532 (1973). Aware that the "forgiveness features and low interest rates provided for by Public Law 92–385" had contributed to the unilateral executive decision to curtail the program, Congress attempted to resolve the crisis by repealing those provisions. S. Rep. No. 93–85, p. 1 (1973). Public Law 93–24, 87 Stat. 24, which became effective on April 20, 1973, set the interest rate on emergency loans at 5%, limited the availability of loans to those unable to obtain credit from other sources, and eliminated entirely the provision that had previously allowed for cancellation of a portion of the principal. A grandfather clause provided that the terms of the earlier act, Pub. L. 92–385, would remain applicable to disasters designated between January 1 and December 27, 1972.

Left unclear, however, was the status of disasters occurring during the 4-month period between December 27, 1972, and April 20, 1973, the effective date of Pub. L. 93–24. Congress resolved this uncertainty by passing Pub. L. 93–237, the provision at the center of this case. Section 4 of the new Act provided that, "[n]otwithstanding the provisions of Public Law 93–24," loans "with respect to natural disasters which occurred" during this interim period would be governed by the more generous terms of Pub. L. 92–385. In addition, § 10(c) provided that the deadline for applying for a loan would be extended 90 days beyond the date of the enactment of Pub. L. 93–237. This 90-day extension supplanted the established regulatory policy of the Secretary to accept loan applications for crop losses only if filed within nine months of the formal disaster declaration. (For physical losses the deadline was 60 days.) According to the Conference Report, the purpose of the extension was to make sure that the FmHA's "administratively set deadlines" took into account the confusion among farmers concerning the numerous changes in federal disaster relief law in the recent past. S. Conf. Rep. No. 93–363, p. 6 (1973). The bill was signed into law on January 2, 1974. Thus, the congressionally mandated 90-day period for loans under Pub. L. 93–237 expired on April 2, 1974.

The Florida flood coincided with this period of confusion in the administration of federal disaster relief. Between May 26, 1973 (the date the disaster was declared), and January 2, 1974 (the date Pub. L. 93–237 became law), the loan program was administered pursuant to the terms of Pub. L. 93–24. Accordingly, during this initial loan period, farmers had nine months, or until February 26, 1974, to submit applications for emergency loans. At the time of the May 26, 1973, Presidential disaster declaration, and throughout the initial loan period, FmHA rules required the agency to follow certain procedures designed to notify potential borrowers of the availability of disaster relief. 7 CFR § 1832.3(a)(1) (1973). In addition to a general obligation to "make such public announcements as appear appropriate," the regulations required the FmHA County Supervisor to inform various local officials and "agricultural lenders" of "the assistance available under [the] program." *Ibid.*[1] It is undisputed that during the initial loan period no applications were filed.

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[1] Title 7 CFR § 1832.3 (1973) provides in pertinent part:

"(a) [W]here there is a Presidential major disaster declaration, the National Office will notify the State Director and the Finance Office of the name of the counties . . . eligible for Federal assistance under the declaration, and the period during which [emergency] loans will be made based on

On February 15, 1974, approximately six weeks after the enactment of Pub. L. 93–237, the FmHA issued instructions to its staff concerning the implementation of the new emergency loan program. App. to Pet. for Cert. 48a. Shortly thereafter, the Secretary published these instructions without material change in the Federal Register.[2] 39 Fed. Reg. 7569 (1974) (later codified at 7 CFR §§ 1832.81–1832.92 (1975)). The Federal Register publication set out in detail the terms and conditions of the new program, including the 1% interest rate, the $5,000 forgiveness provision, and the absence of any requirement that the applicant demonstrate the unavailability of other credit. 39 Fed. Reg. 7571 (1974). The regulation also specified that "the termination date for acceptance of applications . . . will be April 2, 1974." *Id.*, at 7570.

Also included in the staff instructions were directions that "State Directors and County Supervisors . . . inform the news media, including newspapers, radio, and television in the affected counties of the provisions of P. L. 93–237." App. to Pet. for Cert. 49a (later published as § 1832.82(a) of the "Special Emergency Loan Policies . . . Implementing Applicable Provisions of Public Law 93–237," 39 Fed. Reg. 7569 (1974)). Attached to the instructions was a suggested news

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the major disaster. The State Director will notify the appropriate County Supervisors immediately, and instruct them to make [emergency] loans available . . . . The State Director will also notify the State USDA Defense Board Chairman and will make such public announcements as appear appropriate.

"(1) Immediately upon receiving notice about counties under his jurisdiction, the County Supervisor will notify the appropriate County USDA Defense Board Chairman and make such public announcements as appear appropriate about the availability of [loans]. Also, the County Supervisor will explain to other agricultural lenders in the area the assistance available under this program."

[2] Pursuant to 5 U. S. C. §§ 553(b)(B) and (d)(3), the agency dispensed with notice and comment, explaining that any delay in implementing the provisions of Pub. L. 93–237 would be contrary to the public interest. 39 Fed. Reg. 7569 (1974).

release.[3] App. to Pet. for Cert. 50a–51a. The release explained that farmers who had not yet received an emergency loan could apply for such a loan at the local FmHA office. Although not setting out the details of the new program, the model release did state that "loan applications will be taken under the terms of a new law (P. L. 93–237) enacted January 2, 1974." *Id.*, at 51a. Consistent with these instructions, the State FmHA director forwarded the sample news release to local agency offices. Those offices in turn sent copies to the local media, and, on at least two occasions, the releases were carried in newspapers in the north Florida disaster area. Record, Defendants' Exhibits 10–12. During this second loan period, that is, the period between the enactment of Pub. L. 93–237 and the expiration of the 90-day deadline on April 2, 1974, no more than four farmers from the Florida disaster area applied for emergency loans.

On August 19, 1976, respondent Payne, a north Florida farmer, instituted the present action in the United States District Court for the Middle District of Florida. Although he had received actual notice of the special 1974 emergency loan program, he sought to represent a class of approximately 2,500 farmers who had been eligible for loans under that program but, because of lack of notice, had not been aware of their eligibility. Contending that the FmHA's failure to publicize the program more fully violated the agency's own regulations and deprived them of property without due process of law, respondents sought an injunction directing the FmHA to reopen the loan program under the terms prevailing during the period "up to and including April 2, 1974." Complaint 6.

The District Court certified the class and granted the requested relief.[4] In a variety of different ways, the court found, the FmHA had failed to give adequate notice of the availability of loans. Most of the notice deficiencies specifically found by the court occurred during the initial loan period. It found, for example, that a number of farmers had left a June 1973 meeting with the incorrect impression that they were ineligible for loans, that FmHA officials knew of this misimpression, and that they failed to correct it. The court also found that press releases describing the terms of both the initial and new loan programs were incomplete. Finally, the court determined that, in violation of the specific requirements of 7 CFR § 1832.3(a)(1) (1973), the FmHA had failed to notify various state and county officials of the availability of emergency loans. The District Court did not allude to the specific notice requirements promulgated by the agency in connection with the implementation of Pub. L. 93–237. See 39 Fed. Reg. 7569 (1974) (§ 1832.82(a)). Apparently assuming, however, that the earlier notice requirements contained in 7 CFR § 1832.3(a)(1) (1973) continued to apply during the new loan period, the court held that the agency's failure to adhere to these requirements required it to reopen the *new* loan program for a 60-day period extending from April 15, 1981, to June 15, 1981. In particular, the court premised the remedy on the FmHA's failure "to make such public announcements as appear appropriate." *Ibid.*

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[3] The publicity directions, but not the model news release, were later published in the Federal Register, *id.*, at 7570, and the Code of Federal Regulations, 7 CFR § 1832.82(a) (1975).

[4] The District Court also directed the FmHA to give appropriate notice of the loan program. The Secretary concedes that compelling notice was

The Court of Appeals for the Eleventh Circuit affirmed, but on different grounds. *Payne* v. *Block*, 714 F. 2d 1510 (1983). It accepted the District Court's various findings concerning the FmHA's failure to comply with the notice requirements set out in 7 CFR § 1832.3(a)(1) (1973). Those findings, however, "pertain[ed] only peripherally" to its decision to affirm. 714 F. 2d, at 1519. Regardless of any violations of 7 CFR § 1832.3(a)(1), the court concluded, the FmHA had failed to comply with its self-imposed obligation to notify the

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within the remedial authority of the court if, in fact, adequate notice had not been given previously. The issue is, in any event, moot since all members of respondent class now clearly have notice of the provisions of Pub. L. 93–237.

public of the new loan program. The agency had announced in the Federal Register that it would "inform the news media . . . of the provisions of P. L. 93–237." 39 Fed. Reg. 7570 (1974) (§ 1832.82(a)). This it had not done, the court believed, because the news releases announcing the new loan program had failed to explain its generous terms. In view of the established proposition that agencies are duty bound to adhere to their own procedures, the court held, the most appropriate remedy for the violation was an injunction directing the agency to reopen the loan program. In reaching this conclusion, the Court of Appeals rejected the Government's argument that the April 2, 1974, application deadline was required by an Act of Congress and, therefore, beyond the authority of the District Court to expand. In the court's view, Pub. L. 93–237 had merely required the FmHA to extend its administratively set deadline for 90 days. Nothing in the Act, however, divested the agency of discretion to extend it further.

The Secretary sought review in this Court, and we granted the petition for certiorari, vacated the judgment below, and remanded for reconsideration in light of our decision in *Heckler* v. *Community Health Services of Crawford County, Inc.*, 467 U. S. 51 (1984). *Block* v. *Payne*, 469 U. S. 807 (1984). In *Community Health Services*, the Court held that, even assuming that principles of equitable estoppel ever applied against the Government, "a private party surely cannot prevail [on that theory] without at least demonstrating that the traditional elements of estoppel are present." 467 U. S., at 61. The Court of Appeals, observing that petitioners' liability was premised not on a theory of equitable estoppel but on the agency's failure to follow its own regulations, adhered to its prior views and reinstated its decision. *Block* v. *Payne*, 751 F. 2d 1191 (1985).

Because the decision below exposes the Federal Government to substantial potential liability and because its reasoning implicates important questions about a federal court's remedial powers, we again granted certiorari. *Block* v. *Payne*, 474 U. S. 815 (1985). We now reverse.

II

The Secretary's principal argument in this Court is that the remedy granted below shares all of the essential characteristics of an equitable estoppel against the Government and, accordingly, should be analyzed on those terms. We acknowledge that the practical effect of the injunction requiring the reopening of the loan program is to estop the FmHA from relying on the validly promulgated regulatory deadline as a basis for refusing to process further loan applications.[5] And we readily agree that, had respondents sought relief on an equitable estoppel theory, they could not prevail. As we observed only recently, even assuming that the Government is ever subject to estoppel, a "private party surely cannot prevail without at least demonstrating that the traditional elements of an estoppel are present." *Heckler* v. *Community Health Services of Crawford County, Inc.*, 467 U. S., at 61. An essential element of any estoppel is detrimental reliance on the adverse party's misrepresentations, *id.*, at 59 (citing 3 J. Pomeroy, Equity Jurisprudence § 805, p. 192 (S. Symons ed. 1941)); and neither the named plaintiffs, much less the 2,500 members of the class they represent, have sought to demonstrate such reliance. Moreover, the only misconduct specifically found by the District Court was the failure to give effective notice of information that, at least with respect to the second loan period, was concededly published in the Federal Register. Our cases leave no doubt that "failure to fully publicize the rights . . . accorded" by an Act of Congress does not "give rise to an estoppel against the Government." *INS*

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[5] The Secretary has abandoned his claim that the statute itself expressly disabled the Secretary from extending the deadline beyond April 2, 1974. See S. Conf. Rep. No. 93–363, p. 6 (1973) (describing Pub. L. No. 93–237 as requiring the Secretary to "extend" the "administratively set deadlin[e]" by 90 days).

v. *Hibi*, 414 U. S. 5, 8–9 (1973) *(per curiam)*. See also *Heckler* v. *Community Health Services of Crawford County, Inc.*, *supra*, at 63 ("[T]hose who deal with the Government are expected to know the law"); *Federal Crop Ins. Corp.* v. *Merrill*, 332 U. S. 380, 384 (1947).

As the Court of Appeals correctly observed, however, respondents' inability to satisfy the stringent requirements of common-law estoppel does not independently decide the case. Indeed, beginning with their initial complaint and throughout the course of the litigation, respondents have never sought to rely on estoppel as a basis for recovery. Their theory instead, and the theory on which the lower courts granted the injunction, is that the Administrative Procedure Act (APA), 5 U. S. C. § 551 *et seq.*, authorizes this kind of relief to remedy the FmHA's alleged failure to comply with its duly promulgated notice regulations. It may well be that some of the same concerns that limit the application of equitable estoppel against the Government bear on the appropriateness of awarding other remedies that have a close substantive resemblance to an estoppel. We reject, however, petitioners' suggestion that any remedy that can be analogized to an equitable estoppel is necessarily invalid, regardless of the source of the cause of action, unless the plaintiff succeeds in proving all the elements of common-law estoppel. Cf. *Honda* v. *Clark*, 386 U. S. 484, 494–495 (1967). Indeed, any other rule has the potential for divesting the courts of the remedial authority specifically envisioned by Congress under the APA. If, for example, a farmer had filed a loan application prior to the expiration of the loan deadline and a court determined that the denial of the application after the deadline's expiration was "arbitrary, capricious [and] not in accordance with law," 5 U. S. C. § 706(2)(A), the appropriate remedy under the APA would be to direct that the application be granted or reconsidered. Although this would, in a sense, estop the Government from applying the deadline, we have never suggested that the applicant would be under an obligation to satisfy the requirements of proving an equitable estoppel to obtain the relief specifically available under the APA.

The question before us then is not whether the Secretary should be estopped from applying the deadline, but whether the relief afforded by the District Court was appropriate under the APA. Respondents contend that the notice regulations, having been promulgated pursuant to the Secretary's delegated rulemaking authority, had the force and effect of law and therefore were binding on the agency. To remedy this noncompliance, they suggest, the District Court had the authority under 5 U. S. C. § 706 to "compe[l] 'action unlawfully withheld' [notice] and 'set aside agency action' [application of the deadline] found to be 'without observance of procedures required by law.'" Brief for Respondents 21 (quoting 5 U. S. C. § 706) (bracketed material in original).

To prevail on this theory, respondents must clear at least three substantial hurdles. At the outset, not all agency publications are of binding force, *Schweiker* v. *Hansen*, 450 U. S. 785, 789 (1981); and it remains to be shown that the notice provisions, which began life as unpublished staff instructions, are the kind of agency law the violation of which is remediable at all. Second, an agency's power is no greater than that delegated to it by Congress. Thus, even assuming that Pub. L. 93–237 left the Secretary some discretion to extend the 90-day deadline beyond April 2, 1974, it would hardly be an abuse of that discretion to refuse to do so many years after the disaster had receded if such an extension would be inconsistent with the intent of Congress. Finally, the "agency action" respondents seek to have set aside is the "application of the deadline." Yet, with the exception of respondent Payne, who clearly has no standing,[6] there is no allegation that any member of the class has ever applied for a loan. Although the APA includes "failure to act" in its definition of reviewable agency action, 5 U. S. C. § 551(13), it is far from clear that relief under the APA is appropriate when the allegedly aggrieved party has failed entirely to present its claim to the agency. Cf. *Mathews* v. *Eldridge*, 424 U. S. 319, 328 (1976).

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[6] Because Payne had actual notice of the new loan program and actually applied for a loan, the Secretary argued in the Court of Appeals that Payne lacked standing to complain that the publicity was inadequate. The Court of Appeals granted a limited remand, and the District Court entered an

We need not, however, definitively resolve any of these issues. Nor need we confront the Secretary's broader contention that it is in all instances inappropriate for a court, reviewing for agency compliance with the APA, to set aside one validly promulgated regulation to remedy an alleged violation of another entirely independent one. An essential predicate of the relief granted below is that the FmHA in fact failed to comply with its own rules. As we now explain, the Court of Appeals' conclusion that the FmHA violated its self-imposed obligation to give notice of the loan program is insupportable.

The Court of Appeals relied exclusively on the FmHA's purported violation of § 1832.82(a), the new notice provision, to uphold the injunction directing the Secretary to reopen the loan program. Although the agency did issue press releases, the court reasoned, its failure to describe the generous terms of the new program breached its regulatory obligation to "'inform the news media . . . of the *provisions* of P. L. No. 93-237.'" 714 F. 2d, at 1520, quoting 39 Fed. Reg. 7570 (1974) (emphasis supplied by Court of Appeals).

This reasoning is demonstrably incorrect. Public Law 93-237 itself said nothing at all about the availability of a reduced interest rate, the possibility of partial forgiveness of the loan principal, or the elimination of the requirement that credit be unavailable from other sources. It merely stated that "[n]otwithstanding the provisions of Public Law 93-24," loans with respect to disasters occurring prior to April 20, 1973, would

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amended final judgment naming as class representative another class member who allegedly had not received notice of the program. App. to Pet. for Cert. 46a-47a.

be administered under Pub. L. 92–385. Thus, the statement in the news release that "loan applications will be taken under the terms of a new law (P. L. 93–237) enacted January 2, 1974," though not a model of clarity, was no less informative than were the "provisions" of the Act the release was endeavoring to describe. App. to Pet. for Cert. 51a; 7 CFR § 1832.82(a) (1975).

Moreover, the Court of Appeals' holding runs roughshod over the established proposition that an agency's construction of its own regulations is entitled to substantial deference. *United States* v. *Larionoff*, 431 U. S. 864, 872 (1977); *Udall* v. *Tallman*, 380 U. S. 1, 16–17 (1965). The publicity directive that was later codified at 7 CFR § 1832.82(a) (1975) was originally issued as a staff instruction designed to describe the procedures for implementing Pub. L. 93–237. App. to Pet. for Cert. 48a–49a. Accompanying the instruction was a sample press release identical in all pertinent respects to those sent to the media in the area of the Florida disaster. *Id.*, at 50a–51a. Because the suggested release obviously reflected the agency's contemporaneous understanding of the scope of the publicity directive, it is logically untenable to suggest that the agency violated the directive by issuing press releases modeled explicitly on the sample.

The Court of Appeals specifically disclaimed any reliance on 7 CFR § 1832.3(a)(1) (1973), the Secretary's previous publicity directive, to support its affirmance of the District Court's judgment. As they are entitled to do, however, respondents now defend that judgment on the alternative theory that the agency's violation of this earlier notice provision warranted the remedy of an injunction reopening the loan program. We find this theory no more supportable than that relied on by the Court of Appeals. As an initial matter, any violations of this regulation that occurred during the first loan period are plainly irrelevant. Starting with their complaint, and throughout the course of this lengthy litigation, respondents have sought to have the loan program reopened under the more generous terms available under Pub. L. 93–237. And such was the relief granted by the District Court. App. to Pet. for Cert. 45a. As a simple matter of causation, any failure to inform respondents about the old loan program cannot support the remedy of requiring the FmHA to process loan applications under the "terms and benefits" available under the new one. *Ibid.*

Nor do we believe that any noncompliance with the terms of 7 CFR § 1832.3 during the second loan period would justify the District Court's remedy.[7] Although the District Court did find that this provision had been violated during the initial loan period, it is far from clear from the face of its opinion that it found any such violations during the second period. Even assuming such findings, however, we agree with the conclusion of the Court of Appeals for the Ninth Circuit that the notice provisions of 7 CFR § 1832.3 were no longer applicable during the period after the enactment of Pub. L. 93–237, at least with respect to disasters declared prior to the date the new law came into force. See *Emergency Disaster Loan Assn., Inc.* v. *Block*, 653 F. 2d 1267, 1270 (1981).

By its terms, § 1832.3(a) requires only notice of the loan program in place at the time of the Presidential disaster declaration. See also § 1832.92 (1975) (describing § 1832.3 as setting out procedures for reporting natural disaster designations). Accordingly, its plain language casts serious doubt on respondents' assumption that it was also intended to serve as a means of giving notice of midcourse changes in the terms of the loan program long after the disaster had been declared.

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[7] JUSTICE STEVENS makes much of the fact that the new regulation was not issued until February 27, 1974, several weeks after Pub. L. 93–237 was signed into law. In his view, this delay violated the command of § 1832.3(a) to provide notice "immediately." This reasoning is flawed in several respects. First, it entirely ignores our conclusion that, by its terms, § 1832.3 was simply inapplicable to the new loan program. Second, even if somehow applicable, § 1832.3 requires the State Director to provide "immediat[e]" notification to County Supervisors only *after* he himself has received notice from the "National Office"; and it is undisputed that the Secretary did not issue staff instructions until February 15, 1974. Finally, it is far from clear that a time lag of a mere few weeks between the enactment of a new law and the issuance of implementing regulations fails to qualify as "immediate" action within the meaning of the pertinent regulation.

Any ambiguity about the regulation's reach is dispelled by the history of Pub. L. 93–237 itself. As the Court of Appeals recognized, Congress was acutely aware of confusion in the administration of the Nation's disaster relief laws when it enacted Pub. L. 93–237. 714 F. 2d, at 1516–1517. S. Conf. Rep. No. 93–363, p. 6 (1973). A central objective of the new Act was to correct this confusion by clarifying the credit terms available during this period and by requiring the Secretary to extend the application deadline to compensate for prior "uncertain[ties]" in the law. *Ibid.* Consistent with that objective, the Secretary announced in the Federal Register the new procedures the agency would follow to "implemen[t] applicable provisions of Public Law 93–237." 39 Fed. Reg. 7569 (1974). These procedures, which included the notice provision later codified at 7 CFR § 1832.82(a), were designed to "supplemen[t] and modif[y]" the procedures that had been in place under the old regime, including 7 CFR § 1832.3(a). While this language is ambiguous, the regulatory history strongly suggests that in adopting notice procedures specifically geared to the new law, the Secretary intended for those procedures to be the principal mechanism for spreading the word about Pub. L. 93–237 in areas in which a disaster had already been declared. Aware of Congress' belief that prior efforts to implement the old program had failed, this history suggests, the Secretary sought to take a different tack to assure effective implementation of the new one—notification of the media pursuant to § 1832.82.

This interpretation is confirmed by § 1832.92, also adopted as part of the FmHA's efforts to implement Pub. L. 93–237. 39 Fed. Reg. 7575 (1974). There, the Secretary specifically provided that for any "new" disaster designations, notice should be given pursuant to § 1832.3. There is no mention whatever of § 1832.3 in the balance of the regulations dealing with disasters that had already been declared at the time the regulation was published. A fair inference from this omission is that for disasters, such as the Florida flood, that had already been declared at the time of the enactment of Pub. L. 93-237, the Secretary intended that § 1832.82(a), rather than § 1832.3, provide the appropriate mechanism for notifying affected farmers about the new loan program. Accordingly, any failure to follow the old notice provisions during the second loan period was entirely consistent with the Secretary's intended approach and provides no permissible basis for ordering the new program reopened.

III

We conclude, therefore, that the lower courts erred in holding that the Secretary's conduct violated the only notice procedures relevant to the implementation of Pub. L. 93-237. Accordingly, even assuming, *arguendo*, that reopening the loan program would have been an appropriate remedy had the relevant regulations been violated, awarding that relief was clearly improper in light of the FmHA's compliance with its own procedures. Nor can the relief be supported on the theory, not addressed by either court below, that inadequate notice of the loan program deprived respondents of property without due process of law. We have never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth Amendment. *Walters* v. *National Assn. of Radiation Survivors*, 473 U. S. 305, 320, n. 8 (1985). Even on the assumption that they do, however, the notice published in the Federal Register, as well as that afforded by the Secretary in full compliance with his own procedures, was more than ample to satisfy any due process concerns. See 44 U. S. C. § 1507 (Publication in

Federal Register "is sufficient to give notice of the contents of the document to a person subject to or affected by it").

Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE STEVENS, dissenting.

When Congress enacts a generous program to provide relief for the victims of a natural disaster, the Secretary of Agriculture has a duty to implement that program in the spirit which motivated its enactment even if he believes a more parsimonious policy will serve the national interest. On January 2, 1974, Congress enacted such a program to benefit, among others, the Florida farmers who had suffered serious losses as the result of a disaster that the President had declared on May 26, 1973. Pub. L. 93-237. On the date the statute was enacted, as well as the date of the disaster and the date of the President's declaration, regulations were in place that required the Department to give appropriate notice to the State Director, the appropriate county officials, the agricultural lenders in the area, and the public. See 7 CFR § 1832.3(a) (1973). *Ante*, at 930–931, n. 1. The regulations plainly stated that effective notice should be given "immediately."

The District Court found—and the Court does not disagree—that the Secretary failed to comply with § 1832.3(a). For several weeks after the enactment of the statute, the Secretary took no public action. On February 27, he promulgated a new announcement—which was explicitly intended to "supplement" the existing notice regulations—requiring that advice be given to the news media. Pursuant to that announcement, an ambiguous and uninformative news release was prepared and distributed. The Court nevertheless holds that (1) the release complied with the supplementary regulation issued on February 27 and (2) the supplementary regulation somehow superseded the specific § 1832.3(a) notice provisions which were already in place when the statute was enacted. These holdings, I submit, misread the regulations and are not faithful to the intent of the Congress that enacted the governing statute.

Before explaining in greater detail why I agree with the District Court and the Court of Appeals' findings concerning the Secretary's flagrant violation of the notice regulations, I shall briefly comment on the timeliness of the action and the Court's correct rejection of the Government's primary challenge to the propriety of that remedy.

I

This litigation was commenced on August 19, 1976. In the Court of Appeals, the Secretary contended that the action was not timely because the emergency loan program authorized by Pub. L. 93–237 expired on April 2, 1974. The Court of Appeals held, however, that "where, as here, exigent circumstances beyond the farmers' control precluded intended beneficiaries from applying for loans, the agency had the power to extend the loan period and the District Court was within its power in ordering the agency to do so. To hold otherwise would allow the FmHA to totally fail to provide notice to congressionally intended potential beneficiaries and avoid being called to task for such conduct." *Payne* v. *Block*, 714 F. 2d 1510, 1517 (CA11 1983).[1] In this Court, the Secretary has abandoned his claim that he had no power to extend the deadline for loan applications. *Ante*, at 935, n. 5.

The Secretary has argued, however, that the remedy ordered by the District Court was improper because it rested on an equitable estoppel theory. The Court today correctly—and unanimously—rejects this argument, thus answering the central question of law that prompted it to grant certiorari in a way that completely repudiates the submission of the Solicitor General.[2] Thus, neither the doctrine of estoppel nor the passage of time since the emergency loan program's administrative deadline was authorized has any bearing on the question that controls the outcome of the case. That question is whether the Secretary provided the intended beneficiaries of the emergency loan program with the notice that was required by law. The question is best answered after briefly describing the historical context in which it arose.

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[1] In a footnote, the Court of Appeals added:

"We emphasize that Congress had previously invoked, and 'expected' FmHA would invoke, a similar reopening remedy in 93–237 when potential beneficiaries of the program were confused as to the program's terms." 714 F. 2d, at 1517, n. 26.

II

In 1972 and 1973, the Secretary of Agriculture took the position that he was not obligated to implement emergency loan programs authorized by Congress if he thought it was unwise to do so.[3] His position was consistent with administration policy concerning other programs authorized by Congress at that time. See *Train* v. *City of New York*, 420 U. S. 35 (1975); *Berends* v. *Butz*, 357 F. Supp. 143 (Minn. 1973). As a consequence of this fundamental disagreement between the Secretary and Congress, two legislative measures were adopted that provide the background for this case. First, in response to the Secretary's view that the then existing emergency loan programs were too generous, Congress made three important changes in the programs effective on April 20, 1973. It increased the interest rates from one percent to five percent; it denied eligibility to farmers who could obtain credit elsewhere; and it discontinued the practice of forgiving $5,000 of the principal indebtedness. Thus, after April 20, 1973, the emergency loans were considerably less attractive than they had been before.

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[2] The only "Question Presented" by the Solicitor General in the Government's certiorari petition was the following: "Whether the Secretary of Agriculture *may be equitably estopped* from enforcing a valid regulation establishing a deadline for filing of applications for Farmers Home Administration emergency loans on the ground that the agency's news release announcing the availability of loans did not specify the generous terms of the program." Pet. for Cert. I (emphasis added).

To its credit, in rejecting the Government's equitable estoppel argument, the Court belatedly acknowledges that it unnecessarily prolonged this litigation by vacating the first judgment entered by the Court of Appeals in 1983 and remanding for further consideration in the light of our decision in *Heckler* v. *Community Health Services, Inc.*, 467 U. S. 51 (1984). See *Block* v. *Payne*, 469 U. S. 807 (1984).

In light of the possible incongruity of considering this challenge 13 years after the natural disaster that triggered the loan obligations, moreover, it is important to emphasize that there has been no suggestion of dilatoriness by respondents. For unexplained reasons, the case took five years before it reached trial. Since then, it has been the Government that has prolonged the proceedings every step of the way—by appealing to the Court of Appeals; by asking this Court to dispose of the case in light of an equitable estoppel case; and by seeking certiorari again after the Court of Appeals correctly noted the inapplicability of the estoppel doctrine. Thus, the unusual length of time between the original program and our consideration of it is irrelevant; to the extent that it is relevant, the Government bears the responsibility for almost all of the delay.

Second, after several months of uncertainty as to whether the old or the new terms applied to disasters during the period in which this case arose, Congress adopted Pub. L. 93-237 for the specific purpose of making the earlier, more generous loan terms available to a specific class of farmers, including those in northern Florida, who suffered severe crop losses as a result of a specific disaster. Thus, respondent farmers had two opportunities to apply for emergency loans—between May 26, 1973, and January 2, 1974, at the higher rate, and between January 2, 1974, and April 2, 1974, at the more favorable rate.

Throughout this period—and for several years thereafter—the Secretary's regulations provided a detailed procedure for giving notice "immediately" to the appropriate County Supervisors and requiring the State Directors to make "such public announcements as appear appropriate."[4] The District Court found, and the Court of Appeals agreed, that the Secretary not only failed to comply with this provision, but actually disseminated a good deal of misinformation. Thus, for example, the State Director advised the County Supervisors, in information intended for public release, that applications had to be filed prior to July 30, 1973—which was correct for loans relating to physical damage—but totally omitted any reference to the fact that the deadline for production loss loans was several months later. In my opinion, however, the more important violations were those that occurred during the second application period—after January 2, 1974, when Congress authorized loans at an interest rate of one percent and on terms that it is difficult to believe any informed and eligible farmer would have refused.

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[3] See Impoundment of Appropriated Funds by the President: Joint Hearings before the Ad Hoc Subcommittee on Impoundment of Funds of the Senate Committee on Government Operations and the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 93d Cong., 1st Sess., 532 (1973) (testimony of Secretary Butz).

III

The notice regulations that were in effect during the first application period remained in effect during the 90 days after the enactment of Pub. L. 93-237 on January 2, 1974.[5] Notwithstanding the dramatic change in the loan terms authorized by that Act, no notice of any kind was published in the Federal Register—or anywhere else—until February 27, 1974, when two-thirds of the reopened application period had already expired. This complete silence for a period of almost two months was unquestionably a plain violation of the regulations' command—if the regulations were, in fact, applicable—that the "State Director will notify the appropriate County Supervisors *immediately* . . . and will make such public announcements as appear appropriate." 7 CFR § 1832.3(a)(1) (1973) (emphasis added).

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[4] At all relevant times the Code of Federal Regulations contained the following provisions:

"(a) . . . The State Director [of the FmHA] will notify the appropriate County Supervisors immediately and instruct them to make EM loans available under § 1832.13. His notification will be confirmed by State requirements issued as soon as possible. The State Director will also notify the State USDA Defense Board Chairman and will make such public announcements as appear appropriate.

"(1) Immediately upon receiving notice about the counties under his jurisdiction, the County Supervisor will notify the appropriate County USDA Defense Board Chairman and make such public announcements as appear appropriate about the availability of EM loans under § 1832.13. Also, the County Supervisor will explain to other agricultural lenders in the area the assistance available under this program." 7 CFR § 1832.3(a)(1) (1973).

[5] Although the majority concludes that the regulation did not apply to Pub. L. 93-237, it does not contest that the § 1832.3 regulation, detailing the required procedure for administering emergency loans, remained in effect during the pertinent period.

On February 27, 1974, the Secretary did publish the conditions of the new program in the Federal Register, and also supplemented the existing notice regulation with the publication of staff instructions that State Directors and County Supervisors should inform the news media of the provisions of Pub. L. 93-237. See 39 Fed. Reg. 7569-7571.

It is thus perfectly clear that the Secretary did not comply with the § 1832.3(a) notice regulations that were in effect when Pub. L. 93-237 was enacted. The Court does not disagree with this conclusion. Rather, it takes the remarkable position that the failure to follow those notice provisions is irrelevant because the Secretary did comply with the instructions promulgated in February. This reasoning is severely flawed.

First, the Court's conclusion does not accord with the language and structure of the February 27 notice provisions. Nothing in these new staff instructions stated or implied that they were intended to replace or to withdraw any of the preexisting notice procedures. Instead, the published notice explicitly stated that the publication of the new provisions "supplements and modifies" the existing regulations, including § 1832.3(a). 39 Fed. Reg. 7569 (1974). "Supplementing" and "modifying" are hardly words that suggest the kind of wholesale obliteration envisioned by the majority.[6]

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[6] Indeed, as the Court points out, *ante*, at 941-942, another of the requirements promulgated on February 27 specifically referred to the

Second, under the Court's own logic, § 1832.3(a) should have been fully applicable for the first two months of the second loan period. If, as the Court suggests, it was the February 27 Federal Register publication that superseded the existing regulations with respect to Pub. L. 93–237, then presumably the earlier regulations were fully in force until then. Yet the Court flatly states that § 1832 simply was inapplicable in the second loan period—even for the significant amount of time in which the "superseding" regulation was not in place.

Finally, the Court's analysis conflicts with the obvious purpose of Congress in passing Pub. L. 93–237. If the new instructions are given the construction that the Court accepts today, they enabled the Secretary to defy or ignore the will of Congress just as effectively as when he simply refused to make emergency loans on the terms authorized by Congress. Given the fact that regulations requiring adequate notice were in effect at the time Congress adopted a special statute to benefit the victims of specific disasters already declared by the President, surely the Secretary had a duty to comply with the pre-existing regulations during the 90-day period specified in the Act. To conclude otherwise, as the Court does, has an anomalous result. Under the Court's analysis, Congress, in liberalizing and extending the loan program, also created some kind of Bermuda Triangle that made blatant violations of the longstanding § 1832.3(a) notice requirements mysteriously disappear and have no legal effect. Indeed, the incongruous consequence of the Court's reasoning is that, if Congress had never passed the new statute, the Secretary would have continued to be bound by the extensive

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§ 1832.3 requirements. See 39 Fed. Reg. 7575 (1974), codified at 7 CFR § 1832.92 (1975) ("Instructions for handling new designations will be forthcoming. In the meantime, natural disasters should be reported and designation requests submitted in accordance with the procedure set forth in § 1832.3"). Far from "confirm[ing]" that the § 1832.3 requirements were now *inapplicable* to already designated disasters, that regulation supports a view that the new regulations were intended merely to supplement the pre-existing § 1832.3 requirements.

§ 1832.3 notice provisions in January and February 1974. For those months would have been within the original loan period. By extending the period and making the terms more favorable, however, Congress somehow vitiated—or permitted the Secretary to vitiate—those notice provisions for the months and program in question.

Thus, the majority's conclusion that § 1832.3(a) did not apply to the Secretary's administration of Pub. L. 93–237 is erroneous.

I also disagree with the majority's conclusion that the Secretary's efforts satisfied the February 27 notice requirements, which were later codified at 7 CFR § 1832.82 (1975). Those duly promulgated requirements unequivocally stated a mandatory obligation: "State Directors and County Supervisors will inform the news media including newspapers, radio, and television in the affected counties of the provisions of P. L. 93–237." 39 Fed. Reg. 7570 (1974). The Secretary does not argue that the single publication of the emergency loan terms in the Federal Register itself constituted compliance with this duty. His claim of compliance during the second application period also rests on the preparation and distribution of a news release. That release, however, did not disclose the loan terms that were authorized by Pub. L. 93–237. Indeed, the only reference to the new statute, the "provisions" of which the Department had a mandatory obligation to explain, was the following: "These loan applications will be taken under the terms of a new law (P. L. 93–237) enacted January 2, 1974." App. to Pet. for Cert. 57a.

An instruction to inform the news media "of the provisions of P. L. 93–237" surely should be construed to require that the news media be informed of the loan terms that the statute authorized.[7] Such a construction would reflect, not an interpretation that "runs roughshod over the established proposition that an agency's construction of its own regulations is entitled to substantial deference," *ante*, at 939, but a simple adherence to the regulation's "plain language." Cf. *Young* v. *Community Nutrition Institute*, *post*, p. 974. It is therefore clear that the new § 1832.82 requirements also were not followed.

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[7] Because Pub. L. 93–237 authorized the generous terms by reference to the earlier statute in which they were spelled out in detail rather than by repeating them in the text of Pub. L. 93–237 itself, the Court states that

In short, the Secretary followed neither the pre-existing § 1832.3 requirements nor the newly promulgated § 1832.82 requirements. The effect was predictable. Although thousands of farmers were eligible for the program, no more than four received loans. As a result, although Congress had shown its intense commitment to this program by repeatedly legislating and by honing the program in an attempt to overcome executive intransigence, the sustained congressional efforts went for naught.[8]

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the press release "though not a model of clarity, was no less informative than were the 'provisions' of the Act the release was endeavoring to describe." *Ante*, at 939. This is a disturbingly cavalier approach to the duty to give appropriate notice to the farmers that Congress was trying to help. Moreover, it is not even accurate because the release did not mention the fact that the program that had been available under prior legislation was again being made available. Without either a mention of the actual terms or the fact that the earlier program was being revived, the press release was virtually meaningless, and certainly less informative than the statute itself.

[8] In view of the majority's statement that the "Court of Appeals specifically disclaimed any reliance on 7 CFR § 1832.3(a)(1) (1973) . . . to support its affirmance of the District Court's judgment," *ante*, at 939, it bears emphasis that the Court of Appeals disclaimed such reliance only because it found the violation of § 1832.82 so patent:

"FmHA failed to comply with federal regulations specifically designed to transmit notice of available emergency loan programs to the *public*. FmHA made no loans during the initial application period and only a handful during the renewed period. . . .

"In light of FmHA's failure to comply with specific prescriptions for notice, we find it unnecessary to determine whether FmHA provided 'such public announcements as appear appropriate' or whether in fact such a requirement is judicially reviewable. We do note, however, the paucity of

IV

In my opinion, the Court's holding allows an executive agency far too much discretion to disregard the plain intent of Congress. The Secretary did not implement the program authorized by Pub. L. 93–237 in the spirit in which it was enacted. "As conceived and passed in both Houses, the legislation was intended to provide a firm commitment of substantial sums within a relatively limited period of time in an effort to achieve an early solution of what was deemed an urgent problem. We cannot believe that Congress at the last minute scuttled the entire effort by providing the Executive with the seemingly limitless power to withhold funds from allotment and obligation." *Train* v. *City of New York*, 420 U. S., at 45–46. The failure to advise the farmers of the congressionally mandated loan provisions was merely a variant of the theme repudiated in *Train*.

I would affirm the judgment of the Court of Appeals.

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public announcement during both the initial and reopened application periods. Especially is this continual dearth of public notice noteworthy where the state director testified that he and his staff were 'flabbergasted' at the lack of response to the emergency loan program. . . .

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"Our review of the record convinces us that the district court was not clearly erroneous in its six pages of findings of fact and that it was correct in its ultimate conclusion of insufficient notice." *Payne* v. *Block*, 714 F. 2d 1510, 1519–1520 (CA11 1983) (footnote omitted).

NANTAHALA POWER & LIGHT CO. ET AL. *v.* THORNBURG, ATTORNEY GENERAL OF NORTH CAROLINA, ET AL.

APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA

No. 85-568. Argued April 21, 1986—Decided June 17, 1986

Appellants Nantahala Power & Light Co. and Tapoco, Inc., are wholly owned subsidiaries of appellant Aluminum Co. of America (Alcoa). Each owns hydroelectric powerplants on the Little Tennessee River, which the Tennessee Valley Authority operates in exchange for providing them jointly with a fixed supply of low-cost "entitlement power." In addition, Nantahala buys a variable amount of high-cost "purchased power" from the TVA's power grid. Tapoco sells all its power to an Alcoa plant in Tennessee, and Nantahala serves public customers in North Carolina. For the purpose of calculating the rate to be charged Nantahala's retail customers, the North Carolina Utilities Commission (NCUC) issued an order allocating entitlement and purchased power between Tapoco and Nantahala that differs from the allocation of entitlement power between them ordered by the Federal Energy Regulatory Commission (FERC) in a wholesale ratemaking proceeding. The NCUC's order resulted from Nantahala's request to raise its intrastate retail rates. The North Carolina Supreme Court affirmed that order.

Held: NCUC's allocation of entitlement and purchase power is pre-empted by federal law. Pp. 962-972.

(a) FERC has exclusive jurisdiction over the rates to be charged Nantahala's interstate wholesale customers. Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. Rather, a State must give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority. The "filed rate" doctrine, under which interstate power rates filed with or fixed by FERC must be given binding effect by state utility commissions in determining intrastate rates, is not limited to "rates" *per se.* Here, FERC's decision directly affected Nantahala's wholesale rates by determining the amount of low-cost power that it may include in its source of power, and FERC required Nantahala's wholesale rates to be filed in accordance with that allocation. FERC's allocation of entitlement power is therefore presumptively entitled to more than the negligible weight given it by NCUC. Pp. 962-967.

(b) NCUC's decision that Nantahala should have included more of the low-cost, FERC-regulated power than it in fact can under FERC's order, runs directly counter to that order and therefore cannot withstand its pre-emptive force. Moreover, NCUC's order impermissibly interferes with the scheme of federal regulation. Since Congress intended FERC's allocation of power in wholesale interstate ratemakings to pre-empt any inconsistent state ratemakings, it is FERC's order rather than NCUC's that must be given effect. Pp. 967–972.

313 N. C. 614, 332 S. E. 2d 397, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which all other Members joined, except POWELL and STEVENS, JJ., who took no part in the consideration or decision of the case.

Rex E. Lee argued the cause for appellants. With him on the briefs were *David W. Carpenter*, *Ronald D. Jones*, *David R. Poe*, *M. Reamy Ancarrow*, *Edward S. Finley, Jr.*, and *William D. Johnson.*

Deputy Solicitor General Cohen argued the cause for the United States as *amicus curiae* urging reversal. On the brief for the United States et al. were *Solicitor General Fried*, *William H. Satterfield*, and *Jerome M. Feit.*

William T. Crisp argued the cause for appellees. With him on the brief were *Lacy H. Thornburg*, Attorney General of North Carolina, *pro se*, *Richard L. Griffin*, Assistant Attorney General, *James D. Little*, and *Robert F. Page.**

JUSTICE O'CONNOR delivered the opinion of the Court.

The Nantahala Power & Light Company (Nantahala) and Tapoco, Inc. (Tapoco), are both wholly owned subsidiaries of the Aluminum Company of America (Alcoa). Tapoco and

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*Briefs of *amici curiae* urging reversal were filed for the State of Tennessee by *W. J. Michael Cody*, Attorney General, *Jim G. Creecy*, Associate Chief Deputy Attorney General, and *Charles L. Lewis*, Deputy Attorney General; for the Edison Electric Institute by *Robert L. Baum* and *Richard M. Merriman;* and for the New England Electric System by *Frederic E. Greenman.*

Briefs of *amici curiae* urging affirmance were filed for the North Carolina Utilities Commission by *Wilson B. Partin, Jr.;* and for the town of Highlands by *James N. Horwood.*

Nantahala each own hydroelectric powerplants on the Little Tennessee River. Almost all of the power that they produce goes to the Tennessee Valley Authority (TVA). In exchange for allowing TVA to pour into its grid the variable quantity of power produced by Tapoco's and Nantahala's facilities, Tapoco and Nantahala jointly receive a fixed supply of low-cost "entitlement power" from TVA. In addition, Nantahala buys a variable amount of high-cost "purchased power" from the TVA grid. Tapoco sells all its power to Alcoa; Nantahala serves public customers.

For the purposes of calculating the rate to be charged Nantahala's retail customers, all of whom are in North Carolina, the Utilities Commission of North Carolina (NCUC) chose an allocation of entitlement and purchased power between Tapoco and Nantahala that differs from the allocation of entitlement power between Tapoco and Nantahala adopted by the Federal Energy Regulatory Commission (FERC) in a wholesale ratemaking proceeding. The North Carolina Supreme Court upheld NCUC's allocation. We noted probable jurisdiction to decide whether NCUC's allocation may stand in light of FERC's ruling. 474 U. S. 1018 (1985). We hold that NCUC's allocation of entitlement and purchased power is pre-empted by federal law.

I

A

This case involves a number of agreements, all of which concern the power grid of TVA. Under the New Fontana Agreement (NFA), to which TVA, Tapoco, and Nantahala are parties, TVA operates all of Tapoco's hydroelectric facilities and 8 of the 11 dams owned by Nantahala. The facilities operated by TVA produce an amount of power that varies in magnitude with the fullness of the harnessed streams. The NFA gives TVA the right to pour all that power into the TVA grid. In exchange, TVA provides jointly to Tapoco and Nantahala a constant annual allocation of low-cost "entitlement power" of 1.8 billion kilowatt-hours per year. The NFA is on file with FERC as a rate schedule. *Nantahala Power & Light Co.*, 19 FERC ¶61,152, p. 61,274 (1982).

Under the 1971 Apportionment Agreement (AA), to which Tapoco and Nantahala are parties, Tapoco is entitled to 1.44 billion kilowatt-hours per year of the entitlement power, and Nantahala is entitled to the remaining 0.36 billion kilowatt-hours per year. The AA therefore allocates 80% of the entitlement power to Tapoco and 20% of the entitlement power to Nantahala. The AA was filed with FERC in 1980 as an appendix to a proposed wholesale rate schedule filed with FERC. *Id.*, at 61,275.

Under a Purchase Agreement to which TVA and Nantahala are parties, Nantahala may purchase additional power from the TVA grid. This "purchased power" is generated in part by nonhydroelectric plants, which is generally a more expensive way to produce electricity than the hydroelectric generation used to produce the entitlement power. As a result, purchased power is about three times as expensive to generate as is entitlement power. Tapoco does not itself purchase additional power from TVA, although Alcoa purchases some high-cost power directly from TVA and uses some of Tapoco's equipment to obtain that power.

Tapoco's only customer is an Alcoa plant in Alcoa, Tennessee, while Nantahala serves various wholesale and retail customers in North Carolina. Tapoco's sales to Alcoa and Nantahala's sales to its wholesale customers are governed by FERC-filed rates, while Nantahala's rates to its retail customers are set by NCUC.

B

In 1976, Nantahala filed a proposed wholesale rate increase with FERC, which has exclusive jurisdiction over interstate wholesale power rates. 16 U. S. C. § 824(b). See also §§ 824d, 824e. FERC is to determine a "just and reasonable" rate for such power, § 824d(a), and Congress has specified various procedures for, and limitations on, the filing of such proposed and approved rates, §§ 824d(c), (d), (e).

In 1978, the town of Highlands (Highlands), a wholesale customer of Nantahala, filed a complaint with FERC. See § 824e(a). This complaint alleged that Alcoa, Tapoco, and Nantahala had violated the Federal Power Act by diverting, to Alcoa's private use, hydroelectric power and facilities dedicated to the public service. The Attorney General of North Carolina intervened in support of Highlands' position on behalf of Nantahala's customers. Because both the proceedings concerning the proposed wholesale rate increase and the proceedings concerning the Highlands complaint eventually involved allegations that Nantahala's costs had been unreasonably increased by misuse of the corporate form, FERC consolidated the two proceedings and resolved them in an opinion issued in May 1982. 19 FERC ¶ 61,152.

Highlands asked FERC to treat the commonly owned Tapoco and Nantahala as a single entity for ratemaking purposes, and to "roll in" their separate costs into the same rate base:

> "Highlands contends that because Nantahala and Tapoco have commingled their assets and liabilities under the NFA, it is not possible to derive a rational method of apportioning costs and benefits on any basis other than a rolled-in cost of service. The town asks [FERC] to pierce the corporate veil between the two utilities and treat them as one entity for ratemaking purposes, to set aside the [AA], to develop Nantahala's rates on a rolled-in cost of service basis, and to order Alcoa and Tapoco to establish an interconnection with Highlands." *Id.*, at 61,275.

FERC acknowledged that corporate entities may be disregarded when used to subvert clear legislative intent. See *Schenley Distillers Corp.* v. *United States*, 326 U. S. 432, 437 (1946) *(per curiam)*. See also *General Telephone Co.* v. *United States*, 449 F. 2d 846, 855 (CA5 1971). Nonetheless, FERC declined to pierce the corporate veil. The particular history of Tapoco and Nantahala, as well as their current separation of customers and management, led FERC to conclude that it could not "find that Alcoa has used the separate corporate identities of Nantahala and Tapoco to frustrate the purposes of the Federal Power Act, or that the two companies operate as an integrated system." 19 FERC, at 61,277.

FERC concluded that the NFA was "the result of arms' length bargaining." *Id.*, at 61,278. FERC found that the AA, in contrast, was unfair to Nantahala. In the AA, Nantahala relinquished certain benefits it had received under an earlier agreement apportioning the entitlement power, but apparently obtained no compensation for that relinquishment. FERC concluded that "the most equitable division of entitlements would give Nantahala that portion of the NFA entitlements which is proportionate to the utility's actual contribution of power turned over to TVA." This portion was 22.5% in FERC's estimation, rather than the 20% of the entitlements power allocated to Nantahala by the AA. *Id.*, at 61,280. FERC stated that its decision did not "reform" the AA, but would "provide entitlements to Nantahala which will result in just and reasonable rates to its wholesale customers." *Ibid.* FERC therefore required Nantahala to file revised rates in accordance with its decision, and to refund any excess amounts collected.

In September 1982, FERC denied rehearing on its May opinion. Nantahala attempted to introduce new evidence that FERC's decision should take fuller account of differences in the kind of power best suited to Nantahala and Tapoco. (Nantahala serves residential customers and therefore needs a continuous, predictable power supply. Tapoco's industrial customer—Alcoa—requires a certain minimum amount of power at a given time to operate its facilities efficiently, but can periodically cease operations if sufficient power is not available.) FERC refused to consider Nantahala's new submission of evidence:

> "In determining just and reasonable rates . . . , [FERC] did not choose to reform the [AA] and was not concerned with the mechanics of how entitlements of energy from TVA are allocated to each party, as long as each party receives its fair share of energy based on that party's contribution of actual energy turned over to TVA. . . . Our concern is that each party receive its proper entitlement. Nantahala entered into a[n] [AA] which we find unfair. As a result, the company had to make purchases from TVA which otherwise would not have had to be made. Nantahala must bear the consequences of its acts and refund rates collected to recover the cost of the excess purchases." *Nantahala Power & Light Co.*, 20 FERC ¶61,430, p. 61,871 (1982).

FERC's decision was upheld on appeal to the United States Court of Appeals for the Fourth Circuit. *Nantahala Power & Light Co.* v. *FERC*, 727 F. 2d 1342, 1348 (1984).

FERC's decision has a direct bearing on this case, but the decision before us is an opinion of the North Carolina Supreme Court that affirmed a NCUC order. That order resulted from Nantahala's request to raise its intrastate retail rates, over which NCUC has exclusive jurisdiction. The Attorney General of North Carolina intervened on behalf of Nantahala's retail customers. Some of Nantahala's wholesale customers also intervened.

In contrast to FERC, NCUC decided that Nantahala and Tapoco were a "single, integrated electric system," and that, "for purposes of setting Nantahala's rates in this proceeding, the Nantahala and Tapoco systems should be treated as one entity with respect to all matters affecting the determination of Nantahala's reasonable cost of service applicable to its North Carolina retail operations." App. to Juris. Statement 182a.

NCUC concluded that there were extensive "concealed benefits" to Tapoco from the AA and that "extensive injustice" to Nantahala thereby resulted. *Id.*, at 183a–197a.

Similarly, NCUC found a number of concealed benefits to Tapoco and injustices to Nantahala resulting from the NFA. NCUC concluded that it was therefore appropriate to "reject [Tapoco's and Nantahala's] proposed allocation methodology in that said methodology in all material respects is based upon the New Fontana Agreement and the Tapoco-Nantahala Apportionment Agreement." *Id.*, at 205a. See also *id.*, at 215a.

NCUC instead adopted the roll-in methodology proposed by the intervenors, which pooled various sources of power available to Tapoco and Nantahala and then allocated the pooled power according to demand. NCUC included in the pool all of the power generated by the Tapoco- or Nantahala-owned facilities operated by TVA, despite the fact that the NFA gave Tapoco and Nantahala the right only to the lesser amount of entitlements power. NCUC included Nantahala's purchased power in the pool, but excluded the power that Alcoa purchased directly from TVA. After accounting for assumed transmission and other losses, NCUC calculated the pool available to the Tapoco-Nantahala system to be 1.85 billion kilowatt-hours. *Id.*, at 220a.

NCUC then calculated Nantahala's demand (from both wholesale and retail customers) to be approximately 0.45 billion kilowatt-hours. Dividing Nantahala's demand of 0.45 billion kilowatt-hours by the 1.85 billion kilowatt-hours of supply available in the Tapoco-Nantahala pool produces a ratio of approximately 24.5%. NCUC used this ratio as Nantahala's share of the total costs of the Tapoco-Nantahala system. *Id.*, at 220a–221a.

NCUC did not differentially allocate costs from various sources of power to Tapoco and Nantahala. Approximately 24.5% of the cost of each source of power was therefore allocated to Nantahala, with approximately 75.5% remaining for Tapoco. Among the sources of power, of course, was the entitlements power. Under the NCUC order, therefore, Nantahala must calculate its costs for purposes of retail ratemaking in North Carolina as if it received 24.5% of the entitlement power, though the FERC order requires it to calculate its costs for purposes of wholesale ratemaking as if it received 22.5% of the entitlement power. NCUC therefore not only expressly rejected the fairness of the NFA and the AA, but employed an allocation of entitlement power that nowhere takes into account FERC's allocation of that same power.

Appellants here challenged NCUC's allocation in the North Carolina courts. The North Carolina Court of Appeals and the North Carolina Supreme Court affirmed NCUC's decision. In an admirably thorough consideration of the myriad issues before it, the North Carolina Supreme Court concluded that NCUC had violated neither the Supremacy nor the Commerce Clause. *State ex rel. Utilities Comm'n* v. *Nantahala Power & Light Co.*, 313 N. C. 614, 332 S. E. 2d 397 (1985). It acknowledged that FERC has exclusive jurisdiction over interstate wholesale rates. *Id.*, at 686–687, 332 S. E. 2d, at 440. It concluded nonetheless that NCUC, in deciding to prevent Nantahala from recovering costs based on a failure to reach a fair NFA and AA, was "well within the field of exclusive state rate making authority engendered by the 'bright line' between state and federal regulatory jurisdiction under the Federal Power Act." *Id.*, at 687–688, 332 S. E. 2d, at 441. The North Carolina Supreme Court emphasized that NCUC had not expressly required Nantahala to disobey any order entered by FERC:

> "[NCUC's] examination of the NFA and [AA] was not undertaken in an effort to either establish wholesale rates or to modify agreements filed with and approved by the FERC. In its order reducing rates [NCUC] expressly rejected the remedy of reforming these agreements to award Nantahala its just level of entitlements and nothing contained in [NCUC's] order purports to change or modify a single word of the several contracts

> or agreements involved, or the actual flow of power thereunder." *Id.*, at 688, 332 S. E. 2d, at 440–441.

The North Carolina Supreme Court also stated that the utilities' statutory pre-emption arguments rested upon a misconception that FERC had found the NFA and AA to be fair and reasonable to Nantahala, when in fact FERC had ruled that the AA was unfair. *Id.*, at 693, 332 S. E. 2d, at 444. Finally, the court determined that NCUC's actions had not placed an excessive burden on interstate commerce. *Id.*, at 710–718, 332 S. E. 2d, at 454–458.

II

A

Appellants argue that the North Carolina Supreme Court's decision is inconsistent with the "filed rate" doctrine, which in pertinent part holds that interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates. Appellants assert that NCUC's allocation of Tapoco's and Nantahala's entitlement power is inconsistent with FERC's allocation, and that the North Carolina Supreme Court's affirmance of NCUC's decision is therefore inconsistent with pre-emptive federal law.

As developed for purposes of the Federal Power Act, the "filed rate" doctrine has its genesis in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, 251–252 (1951). There, this Court examined the reach of ratemakings by FERC's predecessor, the Federal Power Commission (FPC). In *Montana-Dakota*, two power companies with interlocking directorates and joint corporate officers each received some of the other's power, at rates that the FPC had determined were reasonable. After separation of the two companies' management, one of the companies alleged that it had paid unreasonably high rates for the electricity that it had received and been paid unreasonably low rates for the electricity that it had provided. The complaining company laid the blame for these allegedly fraudulent and unlawful rates at the door of the previously interlocking management, and brought suit in federal court.

This Court dismissed the claim. Emphasizing that Congress had given the FPC the right to determine the reasonableness of rates, the Court stated:

> "[The complaining company] cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion. It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms.
>
> "We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the court can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one." *Id.*, at 251–252.

The existence of the interlocking management of the two utilities, and the resulting allegations of fraud, were irrelevant: "Perhaps, in the absence of the Commission's approval, such relationship would be sufficient to raise the presumption [of fraud] under state law, but it cannot do so where the federal supervising authority has expressly approved the arrangement." *Id.*, at 253.

This Court has held that the filed rate doctrine applies not only to the federal-court review at issue in *Montana-Dakota*, but also to decisions of state courts. In this application, the doctrine is not a rule of administrative law designed to ensure that federal courts respect the decisions of federal administrative agencies, but a matter of enforcing the Supremacy Clause. In *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U. S.

571 (1981), for example, this Court overturned a state court's decision that, in calculating damages in a breach-of-contract suit, assumed that the FPC would have approved certain rates as reasonable and thus allowed the utility to charge that rate, although the rates were never in fact filed with the FPC:

> "[U]nder the filed rate doctrine, the [FPC] alone is empowered to make that judgment [of reasonableness], and until it has done so, no rate other than the one on file may be charged. . . . The court below, like the state court in [*Chicago & North Western Transp. Co.* v.] *Kalo Brick* [*& Tile Co.*, 450 U. S. 311 (1981)], has consequently usurped a function that Congress has assigned to a federal regulatory body. This the Supremacy Clause will not permit." *Id.*, at 581–582.

In *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U. S. 311 (1981), the Court similarly noted that the filed rate doctrine as applied to the actions of the Interstate Commerce Commission assisted in the enforcement of the supremacy of federal law:

> "The common rationale of these cases is easily stated: '[T]here can be no divided authority over interstate commerce, and . . . the acts of Congress on that subject are supreme and exclusive.' *Missouri Pacific R. Co.* v. *Stroud*, 267 U. S. 404, 408 (1925). Consequently, state efforts to regulate commerce must fall when they conflict with or interfere with federal authority over the same activity." *Id.*, at 318–319.

See also *Maryland* v. *Louisiana*, 451 U. S. 725 (1981).

Even in contexts not directly addressed by *Arkansas Louisiana Gas*, *supra*, many state courts have applied the filed rate doctrine of *Montana-Dakota* to decisions of state utility commissions and state courts that concern matters addressed in FERC ratemakings. Some state courts have examined this interplay in determining the effect of FERC-approved wholesale power rates on retail rates for electricity. See *Narragansett Electric Co.* v. *Burke*, 119 R. I. 559, 381 A. 2d 1358 (1977), cert. denied, 435 U. S. 972 (1978); *Eastern Edison Co.* v. *Department of Public Utilities*, 388 Mass. 292, 446 N. E. 2d 684 (1983). Others have examined the effect of FERC-approved wholesale rates for natural gas upon retail gas prices. See *Public Service Co. of Colorado* v. *Public Utilities Comm'n*, 644 P. 2d 933 (Colo. 1982); *United Gas Corp.* v. *Mississippi Public Service Comm'n*, 240 Miss. 405, 127 So. 2d 404 (1961); *City of Chicago* v. *Illinois Commerce Comm'n*, 13 Ill. 2d 607, 150 N. E. 2d 776 (1958); *Citizens Gas Users Assn.* v. *Public Utility Comm'n*, 165 Ohio St. 536, 138 N. E. 2d 383 (1956). In both contexts, these courts have concluded that a state utility commission setting retail prices must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price:

> "[T]he Supreme Court has said that a reasonable rate is that rate filed with or fixed by the FPC. [Citing *Montana-Dakota*, 341 U. S. 246 (1951).] '[N]ot even a court can authorize commerce in the commodity on other terms.' *Id.*, at 251. . . . Thus the rate increase in the cost of electricity to Narragansett, filed and bonded by [the supplier], constitutes an actual operating expense and must be so viewed by the [state utility commission]." *Narragansett*, *supra*, at 566, 381 A. 2d, at 1362.

See *Eastern Edison*, *supra*, at 297–300, 446 N. E. 2d, at 687–689; *Public Service Co.*, *supra*, at 938–940; *United Gas Corp.*, *supra*, at 437–443, 127 So. 2d, at 418–420; *City of Chicago*, *supra*, at 615–616, 150 N. E. 2d, at 780–781; *Citizens Gas Users Assn.*, *supra*, at 538, 138 N. E. 2d, at 384.

Many of these cases involved purchases by closely related entities, but these courts have uniformly concluded that FERC's regulation still pre-empted review by state utility commissions of FERC-approved rates. See *Narragansett*, *supra*, at 561, 567, 381 A. 2d, at 1359, 1362–1363 (retailer was wholly owned subsidiary of wholesaler); *Eastern Edison*, *supra*, at 293, 446 N. E. 2d, at 685 (same); *United Gas Corp.*, *supra*, at 437, 442, 127 So. 2d, at 418, 420 (same); *City of Chicago*, *supra*, at 609, 615–616, 150 N. E. 2d, at 777, 780–781 (retailer owned 100% of one wholesale supplier and 70% of another). These decisions are properly driven by the need to enforce the exclusive jurisdiction vested by Congress in FERC over the regulation of interstate wholesale utility rates:

> "[O]ur decisions have squarely rejected the view . . . that the scope of FPC jurisdiction over interstate sales of gas or electricity at wholesale is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest. Rather, Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis. This was done in the Power Act by making FPC jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States." *FPC* v. *Southern California Edison Co.*, 376 U. S. 205, 215–216 (1964).

No such explicit exception by Congress has been alleged here. FERC clearly has exclusive jurisdiction over the rates to be charged Nantahala's interstate wholesale customers. See 16 U. S. C. § 824(b); *New England Power Co.* v. *New Hampshire*, 455 U. S. 331, 340 (1982). Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. A State must rather give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority.

Moreover, the filed rate doctrine is not limited to "rates" *per se:* "our inquiry is not at an end because the orders do not deal in terms of prices or volumes of purchases." *Northern Natural Gas Co.* v. *Kansas Corporation Comm'n*, 372 U. S.

84, 90–91 (1963). Here FERC's decision directly affects Nantahala's wholesale rates by determining the amount of low-cost power that it may obtain, and FERC required Nantahala's wholesale rate to be filed in accordance with that allocation. FERC's allocation of entitlement power is therefore presumptively entitled to more than the negligible weight given it by NCUC.

B

The North Carolina Supreme Court was well aware that "state courts which have considered the question have uniformly agreed that a utility's costs based upon a FERC-filed rate must be treated as a reasonably incurred operating expense for the purposes of setting an appropriate retail rate." 313 N. C., at 692, 332 S. E. 2d, at 443. The North Carolina court did not reject the conclusions of those courts. Rather, it held that reliance on such cases was "misplaced" in light of the fact that the *Narragansett* line of cases has not held the filed rate doctrine "to preclude state authority to determine whether these costs should be automatically passed through to retail consumers in the form of higher rates." 313 N. C., at 693–694, 332 S. E. 2d, at 444. This interpretation of the *Narragansett* line of cases is at best an oversimplification, and in any event does not save NCUC's action from preemption.

In both *Narragansett, supra,* and *Public Service Co., supra,* the courts observed that an increase in FERC-approved wholesale rates need not lead to an increase in retail rates. Both decisions expressly stated, however, that such a divergence between wholesale and retail rates would occur only if costs *other than* those resulting from the purchases of FERC-regulated power or gas were to decrease. See *Narragansett,* 119 R. I., at 568, 381 A. 2d, at 1363 ("The commission . . . may treat the proposed rate increase as it treats other filings . . . and investigate the overall financial structure of [the power company] to determine whether the company has experienced savings *in other areas which might* *offset the increased price"*) (emphasis added); *Public Service Co.*, 644 P. 2d, at 941 ("[The commission] may treat the [increase] as it treats other filings for proposed rate increases . . . [and] investigate whether [either of the gas companies] has experienced *savings in other areas which might offset the increased price* for natural gas to consumers") (emphasis added).

This qualification is perfectly sensible. If, for example, the FERC-approved price of wholesale power rises slightly but a retailer's costs of transformation and transmission significantly decline, the retailer's overall costs might well decrease. A decrease in its retail rates might therefore be appropriate even though the cost of purchasing FERC-regulated power had increased. But in this case, there is no finding or indication that Nantahala's costs of obtaining purchased power have decreased, or that other costs of operation have declined dramatically. There is only NCUC's assertion that Nantahala should have obtained more of the low-cost, FERC-regulated power than Nantahala is in fact entitled to claim under FERC's order. Such a rationale runs directly counter to FERC's order, and therefore cannot withstand the pre-emptive force of FERC's decision.

The North Carolina court also stated that appellants' pre-emption argument "rest[s] upon the faulty premise that FERC deemed both the NFA and the [AA] to be fair and reasonable to Nantahala, when in fact it expressly ruled that the latter agreement was 'unfair' and refused to permit Nantahala to base its requested wholesale rate increase upon the costs incurred thereunder." 313 N. C., at 693, 332 S. E. 2d, at 444. While this description of FERC's decision is accurate as far as it goes, FERC did not merely determine that the NFA was a fair bargain and the AA an unfair one: FERC also set forth a new allocation of power to "provide entitlements to Nantahala which will result in just and reasonable rates." 19 FERC, at 61,280. Even though FERC later stated that it had not reformed the agreement itself, it did require Nantahala to file new rates in accordance with the new, fair allocation of entitlement power between Tapoco and Nantahala. Indeed, FERC stated that "the [AA and an earlier apportionment agreement] clearly are contracts affecting, in some manner, rates and charges under Section 205(c) of the Federal Power Act, and should have been filed when made." *Id.*, at 61,280–61,281. FERC's allocation of entitlement power to Nantahala is therefore reflected in Nantahala's filed rates. NCUC cannot substitute its own conception of what allocation of entitlement power would have been memorialized in a fair AA simply because FERC did not approve the AA without qualification.

We acknowledge that this case does not present the typical application of the filed rate doctrine, in which a middleman faces a FERC-fixed wholesale rate charged by a power supplier. In that situation, for a state ratemaking agency to disregard a FERC-filed rate would clearly be inconsistent with the exclusive federal regulatory scheme over interstate wholesale power prices. The FERC-approved rate at which the middleman purchased power would not be fully recognized as a cost in the retail market, thereby forcing the middleman to sell power at less than its reasonable cost as determined by the federal agency.

Here, in contrast, Nantahala both owns some of the facilities that produce the relevant electricity and sells that power to its retail customers, rather than to a distributor. But FERC's regulation of wholesale power rates nonetheless has a direct effect on Nantahala's costs of producing retail power. Nantahala has, through the NFA, contracted with TVA for the latter to control 8 of Nantahala's 11 hydroelectric facilities, and that arrangement was approved by FERC in the course of rate proceedings over which FERC clearly had exclusive jurisdiction. FERC also examined the AA, a document filed in conjunction with the same proceeding, and concluded that the reasonable allocation of entitlement power was to give 77.5% of that power to Tapoco and 22.5% of that power to Nantahala. From Nantahala's point of view, then, it is in a situation quite similar to that of a purchaser of wholesale power at FERC-approved rates: Nantahala is entitled to include only a certain, FERC-specified amount of low-cost entitlement power among the sources of power from which it can draw in providing retail power. The fact that NCUC is setting retail rates does not give it license to ignore the limitations that FERC has placed upon Nantahala's available sources of low-cost power.

The similarity between this case and the more typical application of the filed rate doctrine is apparent from the impermissible interference that enforcement of NCUC's order would create with the scheme of federal regulation. The filed rate doctrine ensures that sellers of wholesale power governed by FERC can recover the costs incurred by their payment of just and reasonable FERC-set rates. When FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate. See *supra*, at 964–966 (discussing *Narragansett* line of cases). Such a "trapping" of costs is prohibited. Here, Nantahala cannot fully recover its costs of purchasing at the FERC-approved rate if NCUC's order is allowed to stand.

Although the NFA and AA do not purport explicitly to set a sales price for power, FERC's decision on how Nantahala may treat these agreements in determining its wholesale rates obviously does affect Nantahala's costs directly, and thus Nantahala's wholesale rates. Entitlement power is cheap, and purchased power is dear. FERC has ordered Nantahala to set its wholesale rates in light of an allocation of 22.5% of the entitlement power given jointly to Tapoco and Nantahala by TVA (and thus to calculate its overall rates as if it needed to purchase the remainder of its power at purchased-power rates). NCUC, in contrast, has ordered

Nantahala to set its retail rates in light of an allocation of 24.5% of the entitlement power. Because purchased power is more expensive than entitlement power, NCUC's order prevents Nantahala from recovering the full costs of acquiring power under the FERC-approved scheme: Nantahala must under NCUC's order calculate its retail rates as if it received more entitlement power than it does under FERC's order, and as if it needed to procure less of the more expensive purchased power than under FERC's order. A portion of the costs incurred by Nantahala in procuring its power is therefore "trapped." Nantahala can obtain power from TVA only at a rate based on the relatively high cost of procuring power with a mere 22.5% of the low-cost entitlement power included in the mix; but under NCUC's order it can sell that power to retail customers only at a rate based on the relatively lower cost of procuring power with a 24.5% mix of cheap entitlement power.

We think FERC's failure actually to reform the AA does not materially alter this analysis. FERC ordered Nantahala to adjust its wholesale rates so that its average cost per unit of power reflected an allocation of entitlements power different from the allocation set forth in the AA. The effect of that order is, for purposes of this case, essentially the same as reformation of the agreement itself. FERC has determined that Nantahala's average cost of power obtained from TVA should be based on a particular allocation of entitlements power, and no other. By adopting a different allocation, NCUC imputes to Nantahala a different average cost of power, notwithstanding the fact that, under the AA, Nantahala unquestionably is not entitled to demand that TVA supply it with 24.5% of the entitlements power. Consequently, Nantahala is exposed to "trapped" costs. It must, under NCUC's order, pretend that it is paying less for the power it receives from TVA, under agreements not subject to NCUC's jurisdiction, than is in fact the case. Thus, NCUC's imposition of a different allocation of entitlements power carries with it the same risk of "trapped" costs that underlies the *Narragansett* doctrine.

The validity of NCUC's decision to "roll in" the costs of Tapoco and Nantahala is not directly before us. We nonetheless agree with FERC, 20 FERC, at 61,869, that it is at least conceivable that NCUC could validly choose to treat Nantahala and Tapoco as a single system for some purposes—for example, with regard to the costs of constructing their facilities. But, in formulating rates over which it has exclusive jurisdiction, FERC ruled that the NFA and AA should be treated as allocating 22.5% of the entitlement power of the Tapoco-Nantahala system to Nantahala's customers and 77.5% of that power to Tapoco's customer. That allocation, reflected as it is in a filed rate, must be respected by NCUC. If, as a result, Nantahala needs to purchase additional power from some nonentitlement source, that need is a reasonable one.

Accordingly, the North Carolina Supreme Court erred in relying on cases treating the reasonableness of purchasing from a particular source of, rather than paying a particular rate for, FERC-approved power. See *Pike County Light & Power Co.* v. *Pennsylvania Public Utility Comm'n*, 77 Pa. Commw. 268, 273–274, 465 A. 2d 735, 737–738 (1983); *Kansas-Nebraska Natural Gas Co.* v. *State Corporation Comm'n*, 4 Kan. App. 2d 674, 679–680, 610 P. 2d 121, 127 (1980). Without deciding this issue, we may assume that a particular *quantity* of power procured by a utility from a particular source could be deemed unreasonably excessive if lower cost power is available elsewhere, even though the higher cost power actually purchased is obtained at a FERC-approved, and therefore reasonable, *price*. The North Carolina Supreme Court apparently felt that Nantahala procured an unreasonably large amount of purchased power in light of the availability of lower cost entitlement power. But Nantahala's procurement of purchased power is *not* unreasonably large given that Nantahala could not have treated itself as having access to any more low-cost entitlement power than it is eligible to include under FERC's interpretation of what would be a fair allocation. No source of power besides entitlement and purchased power from TVA is said to be available to Nantahala. Purchased power sells at a *higher* price than does entitlement power, and there is no allegation that Nantahala calculated its costs to include less of the low-cost entitlement power than the amount that FERC determined Nantahala was entitled to receive. The North Carolina court's ruling that Nantahala had purchased an unreasonably large quantity of high-cost power from TVA therefore conflicts with FERC's orders in the same manner as would a refusal to recognize a FERC-approved price as a reasonable cost for purposes of retail ratemaking. See *supra*, at 964–966.

Our disposition of the case makes it unnecessary for us to reach the appellants' arguments that NCUC's decision placed an undue burden on interstate commerce in violation of the Commerce Clause. For the reasons stated in this opinion, we reverse the judgment of the North Carolina Supreme Court and remand the case for further proceedings not inconsistent with this opinion.

Reversed.

JUSTICE POWELL and JUSTICE STEVENS took no part in the consideration or decision of this case.

YOUNG, COMMISSIONER OF FOOD AND DRUG ADMINISTRATION *v.* COMMUNITY NUTRITION INSTITUTE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-664. Argued April 30, 1986—Decided June 17, 1986

The Federal Food, Drug, and Cosmetic Act (Act) provides in 21 U. S. C. § 346 that when the addition of any poisonous or deleterious substance to food is required in the production thereof or cannot be avoided by good manufacturing practice, the Secretary of Health and Human Services "shall promulgate regulations limiting the quantity therein or thereon to such extent as he finds necessary for the protection of public health." The Food and Drug Administration (FDA), the Secretary's designee for enforcing the Act, has long interpreted the phrase beginning "to such extent" to modify the word "shall" rather than "the quantity therein or thereon," and therefore views the decision whether to promulgate a § 346 regulation (tolerance level) as a determination to be made by the FDA. Rather than setting a tolerance level for aflatoxin, a potent carcinogen that is unavoidably present in some foods, the FDA set an action level of 20 parts per billion (ppb) (an action level assures food producers that the FDA ordinarily will not enforce the Act's general adulteration provisions against them if the quantity of the harmful substance in food is less than a specified quantity). But in 1980, the FDA published a notice in the Federal Register that the Act would not be enforced as to a certain harvest of corn to be used for livestock and poultry feed where it contained no more than 100 ppb. Respondents, two public-interest groups and a consumer, brought suit against petitioner Commissioner of Food and Drugs in Federal District Court, alleging that the Act requires the FDA to set a tolerance level for aflatoxin before allowing the shipment of food containing the substance, that in this case the FDA had employed insufficient procedures to set the aflatoxin action level even if a tolerance level was not required, and that the FDA's decision to grant the exemption from the action level violated the Act and the FDA's own regulations. Adopting the FDA's longstanding interpretation of § 346 as giving it discretion whether to promulgate a tolerance level, the District Court, on a motion for summary judgment, ruled that the FDA need not establish a tolerance level for aflatoxin before allowing the shipment of the aflatoxin-tainted corn. The Court of Appeals reversed, holding that the FDA's interpretation of § 346 conflicted with its plain language.

Held: In light of § 346's inherent ambiguity, the FDA's interpretation of the provision is sufficiently rational to preclude a court from substituting its judgment for that of the FDA. The legislative history is equally ambiguous and provides no support for assertions that the FDA's interpretation is insufficiently rational to warrant this Court's deference. Pp. 979–983.

244 U. S. App. D. C. 279, 757 F. 2d 354, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, *post,* p. 984.

Paul J. Larkin, Jr., argued the cause for petitioner. With him on the briefs were *Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Geller, Leonard Schaitman, Marleigh D. Dover,* and *Thomas Scarlett.*

William B. Schultz argued the cause for respondents. With him on the brief were *Alan B. Morrison* and *Katherine A. Meyer.**

JUSTICE O'CONNOR delivered the opinion of the Court.

We granted certiorari in this case to determine whether the Court of Appeals for the District of Columbia Circuit correctly concluded that the Food and Drug Administration's longstanding interpretation of 21 U. S. C. § 346 was in conflict with the plain language of that provision. 474 U. S. 1018 (1985). We hold that, in light of the inherent ambiguity of the statutory provision and the reasonableness of the Food

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*Briefs of *amici curiae* urging reversal were filed for the State of South Carolina by *Philip C. Olsson, T. Travis Medlock,* Attorney General, and *Brooks Shealy,* Assistant Attorney General; for the American Feed Industry Association by *David F. Weeda;* for the Grocery Manufacturers of America, Inc., by *Peter Barton Hutt;* for the National Food Processors Association by *H. Edward Dunkelberger, Jr.;* and for the National Peanut Council, Inc., by *James M. Goldberg.*

and Drug Administration's interpretation thereof, the Court of Appeals erred. We therefore reverse.

I

A

The Food and Drug Administration (FDA) enforces the Federal Food, Drug, and Cosmetic Act (Act) as the designee of the Secretary of Health and Human Services. 21 U. S. C. § 371(a). See also 21 CFR § 5.10 (1986). The Act seeks to ensure the purity of the Nation's food supply, and accordingly bans "adulterated" food from interstate commerce. 21 U. S. C. § 331(a). Title 21 U. S. C. § 342(a) deems food to be "adulterated"

> "(1) If it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated under this clause if the quantity of such substance in such food does not ordinarily render it injurious to health; or (2)(A) if it bears or contains any added poisonous or added deleterious substance (other than [exceptions not relevant here]) which is unsafe within the meaning of section 346a(a) of this title . . . ."

As this provision makes clear, food containing a poisonous or deleterious substance in a quantity that ordinarily renders the food injurious to health is adulterated. If the harmful substance in the food is an added substance, then the food is deemed adulterated, even without direct proof that the food may be injurious to health, if the added substance is "unsafe" under 21 U. S. C. § 346.

Section 346 states:

> "Any poisonous or deleterious substance added to any food, except where such substance is required in the production thereof or cannot be avoided by good manufacturing practice shall be deemed to be unsafe for purposes of the application of clause (2)(A) of section 342(a) of this

> title; but when such substance is so required or cannot be so avoided, the Secretary shall promulgate regulations limiting the quantity therein or thereon to such extent as he finds necessary for the protection of public health, and any quantity exceeding the limits so fixed shall also be deemed to be unsafe for purposes of the application of clause (2)(A) of section 342(a) of this title. While such a regulation is in effect . . . food shall not, by reason of bearing or containing any added amount of such substance, be considered to be adulterated . . . ."

Any quantity of added poisonous or added deleterious substances is therefore "unsafe," *unless* the substance is required in food production or cannot be avoided by good manufacturing practice. For these latter substances, "the Secretary shall promulgate regulations limiting the quantity therein or thereon to such extent as he finds necessary for the protection of public health." It is this provision that is the heart of the dispute in this case.

The parties do not dispute that, since the enactment of the Act in 1938, the FDA has interpreted this provision to give it the discretion to decide whether to promulgate a § 346 regulation, which is known in the administrative vernacular as a "tolerance level." Tolerance levels are set through a fairly elaborate process, similar to formal rulemaking, with evidentiary hearings. See 21 U. S. C. § 371(e). On some occasions, the FDA has instead set "action levels" through a less formal process. In setting an action level, the FDA essentially assures food producers that it ordinarily will not enforce the general adulteration provisions of the Act against them if the quantity of the harmful added substance in their food is less than the quantity specified by the action level.

B

The substance at issue in this case is aflatoxin, which is produced by a fungal mold that grows in some foods. Aflatoxin, a potent carcinogen, is indisputedly "poisonous" or "deleterious" under §§342 and 346. The parties also agree that, although aflatoxin is naturally and unavoidably present in some foods, it is to be treated as "added" to food under §346. As a "poisonous or deleterious substance added to any food," then, aflatoxin is a substance falling under the aegis of §346, and therefore is at least potentially the subject of a tolerance level.

The FDA has not, however, set a §346 tolerance level for aflatoxin. It has instead established an action level for aflatoxin of 20 parts per billion (ppb). In 1980, however, the FDA stated in a notice published in the Federal Register:

> "The agency has determined that it will not recommend regulatory action for violation of the Federal Food, Drug, and Cosmetic Act with respect to the interstate shipment of corn from the 1980 crop harvested in North Carolina, South Carolina, and Virginia and which contains no more than 100 ppb aflatoxin . . . ." 46 Fed. Reg. 7448 (1981).

The notice further specified that such corn was to be used only as feed for mature, nonlactating livestock and mature poultry. *Id.*, at 7447.

In connection with this notice, two public-interest groups and a consumer (respondents here) brought suit against the Commissioner of the FDA (petitioner here) in the United States District Court for the District of Columbia. Respondents alleged that the Act requires the FDA to set a tolerance level for aflatoxin before allowing the shipment in interstate commerce of food containing aflatoxin; that the FDA had employed insufficiently elaborate procedures to set its aflatoxin action level even if a tolerance level was not required; and that the FDA's decision to grant the 1980 exemption from the action level independently violated the Act and the FDA's own regulations.

On a motion for summary judgment, the District Court deferred to the FDA's interpretation of §346, and therefore ruled that the FDA need not establish a tolerance level for aflatoxin before allowing the shipment of aflatoxin-tainted corn in interstate commerce. The District Court also ruled against respondents on their other claims.

The Court of Appeals reversed the District Court's conclusion as to the proper interpretation of § 346. 244 U. S. App. D. C. 279, 757 F. 2d 354 (1985). The Court of Appeals determined that Congress had spoken directly and unambiguously to the precise question at issue:

> "The presence of the critical word 'shall' plainly suggests a directive to the Secretary to establish a tolerance, if a food with an unavoidable . . . deleterious substance is to be considered unadulterated.
>
> . . . . .
>
> "It is . . . clear from the structure of the sentence at issue here that the phrase relied upon by the Secretary simply does not modify the pivotal word 'shall.'" *Id.*, at 282, 283, 757 F. 2d, at 357, 358.

After examining the entirety of § 346, the Court of Appeals also concluded that, since tolerance levels make food with added harmful substances unadulterated, tolerance levels were necessary before food could be judged unadulterated. *Id.*, at 283, 757 F. 2d, at 358.

The Court of Appeals considered none of the other issues before the District Court, and therefore only the § 346 issue is before this Court.

II

The FDA's longstanding interpretation of the statute that it administers is that the phrase "to such extent as he finds necessary for the protection of public health" in § 346 modifies the word "shall." The FDA therefore interprets the statute to state that the FDA shall promulgate regulations to the extent that it believes the regulations necessary to protect the public health. Whether regulations are necessary to protect the public health is, under this interpretation, a determination to be made by the FDA.

Respondents, in contrast, argue that the phrase "to such extent" modifies the phrase "the quantity therein or thereon" in § 346, not the word "shall." Since respondents therefore view the word "shall" as unqualified, they interpret § 346 to require the promulgation of tolerance levels for added, but unavoidable, harmful substances. The FDA under this interpretation of § 346 has discretion in setting the particular tolerance level, but not in deciding whether to set a tolerance level at all.

Our analysis must begin with *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). We there stated:

> "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. . . . [A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.*, at 842–844.

While we agree with the Court of Appeals that Congress in § 346 was speaking directly to the precise question at issue in this case, we cannot agree with the Court of Appeals that Congress unambiguously expressed its intent through its choice of statutory language. The Court of Appeals' reading of the statute may seem to some to be the more natural interpretation, but the phrasing of § 346 admits of either respondents' or petitioner's reading of the statute. As enemies of the dangling participle well know, the English language does not always force a writer to specify which of two possible objects is the one to which a modifying phrase relates. A Congress more precise or more prescient than the one that enacted § 346 might, if it wished petitioner's position to prevail, have placed "to such extent as he finds necessary for the protection of public health" as an appositive phrase immediately after "shall" rather than as a free-floating phrase after "the quantity therein or thereon." A Congress equally fastidious and foresighted, but intending respondents' position to prevail, might have substituted the phrase "to the quantity" for the phrase "to such extent as." But the Congress that actually enacted § 346 took neither tack. In the absence of such improvements, the wording of § 346 must remain ambiguous.

The FDA has therefore advanced an interpretation of an ambiguous statutory provision.

> "This view of the agency charged with administering the statute is entitled to considerable deference; and to sustain it, we need not find that it is the only permissible construction that [the agency] might have adopted but only that [the agency's] understanding of this very 'complex statute' is a sufficiently rational one to preclude a court from substituting its judgment for that of [the agency]. *Train, Inc.* v. *NRDC*, 421 U. S. 60, 75, 87 (1975) . . . ." *Chemical Manufacturers Assn.* v. *Natural Resources Defense Council, Inc.*, 470 U. S. 116, 125 (1985).

We find the FDA's interpretation of § 346 to be sufficiently rational to preclude a court from substituting its judgment for that of the FDA.

To read § 346 as does the FDA is hardly to endorse an absurd result. Like any other administrative agency, the FDA has been delegated broad discretion by Congress in any number of areas. To interpret Congress' statutory language to give the FDA discretion to decide whether tolerance levels are necessary to protect the public health is therefore sensible.

Nor does any other portion of § 346 prohibit the FDA from allowing the shipment of aflatoxin-tainted food without a tolerance level, despite the Court of Appeals' conclusion to the contrary. The Court of Appeals stated:

> "Since the existence of a regulation operates to render the food legally unadulterated, the statute, in our view, plainly requires the establishment by regulation of tolerances before aflatoxin-tainted corn may lawfully be shipped in interstate commerce." 244 U. S. App. D. C., at 283, 757 F. 2d, at 358.

The premise of the Court of Appeals is of course correct: the Act does provide that when a tolerance level has been set and a food contains an added harmful substance in a quantity below the tolerance level, the food is legally not adulterated. But one cannot logically draw from this premise, or from the Act, the Court of Appeals' conclusion that food containing substances *not* subject to a tolerance level *must be* deemed adulterated. The presence of a certain premise (*i. e.*, tolerance levels) may imply the absence of a particular conclusion (*i. e.*, adulteration) without the absence of the premise implying the presence of the conclusion. For example, the presence of independent and adequate state-law grounds in the decision of a state supreme court means this Court has no jurisdiction over the case, but the absence of independent and adequate state grounds does not mean that this Court necessarily has jurisdiction. The Act is silent on what specifically to do about food containing an unavoidable, harmful, added substance for which there is no tolerance level; we must therefore assume that Congress intended the general provisions of § 342(a) to apply in such a case. Section 342(a) thus remains available to the FDA to prevent the shipment of any food "[i]f it bears or contains any poisonous or deleterious substance which may render it injurious to health." See generally *United States* v. *Lexington Mill & Elevator Co.*, 232 U. S. 399, 411 (1914) (discussing proper interpretation of the language that became § 342(a)).

The legislative history of the Act provides no single view about whether Congress intended § 346 to be mandatory or permissive with respect to tolerance levels. Compare, *e. g.*, Confidential House Committee Print 2, on Interstate and Foreign Commerce, 75th Cong., 1st Sess., S. 5, § 406(a), reprinted in 5 Legislative History of the Federal Food, Drug, and Cosmetic Act and its Amendments 767, 792 (Dept. of Health, Education, and Welfare 1979) (changing, without explanation, words "is authorized to" to "shall" in relevant provision), with H. R. Rep. No. 2139, 75th Cong., 3d Sess. 6 (1938) (stating that, under the Act, "the establishment of tolerances is *authorized*") (emphasis added). A clearer indication of Congress' intentions with regard to tolerance levels occurred in 1954, when Congress condemned the cumbersomeness of the tolerance-level procedure as applied to pesticides. Congress fashioned a more streamlined procedure for those and other deliberately added substances. See 21 U. S. C. § 346a. But in revisiting § 346, Congress did *not* change the procedures governing unintentionally added substances like aflatoxin. This failure to change the scheme under which the FDA operated is significant, for a "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *NLRB* v. *Bell Aerospace, Co.*, 416 U. S. 267, 275 (1974). See *FDIC* v. *Philadelphia Gear Corp.*, *ante*, at 437; *Zenith Radio Corp.* v. *United States*, 437 U. S. 443, 457 (1978). In sum, although the legislative history is not unambiguous, it certainly is no support for assertions that the FDA's interpretation of § 346 is insufficiently rational to warrant our deference.

Finally, we note that our interpretation of § 346 does not render that provision superfluous, even in light of Congress' decision to authorize the FDA to "promulgate regulations for the efficient enforcement of [the] Act." 21 U. S. C. § 371(a).

Section 346 gives the FDA the authority to choose whatever tolerance level is deemed "necessary for the protection of public health," and food containing a quantity of a required or unavoidable substance less than the tolerance level "shall not, by reason of bearing or containing any added amount of such substance, be considered to be adulterated." Section 346 thereby creates a specific exception to § 342(a)'s general definition of adulterated food as that containing a quantity of a substance that renders the food "ordinarily . . . injurious to health." Simply because the FDA is given the choice between employing the standard of § 346 and the standard of § 342(a) does not render § 346 superfluous.

For the reasons set forth, the judgment is reversed, and the case is remanded to the Court of Appeals for the District of Columbia Circuit for further proceedings consistent with this opinion.

Reversed.

JUSTICE STEVENS, dissenting.

The parties agree that aflatoxins are added, unavoidable contaminants of food and as such are governed by the following provision of the Federal Food, Drug, and Cosmetic Act:

> "[W]hen such substance . . . cannot be so avoided, the Secretary *shall promulgate regulations* limiting the quantity therein or thereon *to such extent* as he finds necessary for the protection of public health, and any quantity exceeding the limits *so fixed* shall also be deemed to be unsafe for purposes of the application of clause (2)(A) of section 342(a) of this title." 21 U. S. C. § 346 (emphasis added).

To one versed in the English language, the meaning of this provision is readily apparent. The plain language of the section tells us when the Secretary's duty to promulgate regulations arises—"when such substance . . . cannot be so avoided"; it tells us the purpose of the regulations—to establish a tolerance level that will enable manufacturers to know what they can lawfully produce and to enable the public to know what they can safely consume; and it tells us what standard he should employ in drafting them—"to such extent as he finds necessary for the protection of public health." For purposes of deciding this case, the parties' agreement that aflatoxins are substances that "cannot be so avoided" within the meaning of the section triggers the obligation to initiate rulemaking.

The Court's contrary conclusion reflects an absence of judgment and of judging. Before exploring either infirmity, it is worthwhile to summarize the Court's reason for reading the section to authorize, but not require, the promulgation of regulations. First, the Court declares that the qualifying language—"to such extent as he finds necessary for protection of the public health"—is a "dangling participle" that might or might not modify the words "shall promulgate regulations." *Ante*, at 981. Second, as between the two readings of this "ambiguous statutory provision," *ibid.*, deference dictates that the Commissioner of the Food and Drug Administration (FDA) (to whom enforcement of the Act has been delegated) may take his pick.

The Court's finding of ambiguity is simply untenable. The antecedent of the qualifying language is quite clearly the phrase "limiting the quantity therein or thereon," which immediately precedes it, rather than the word "shall," which appears eight words before it. Thus, the Commissioner is to "limi[t] the quantity [of an added, unavoidable poisonous or deleterious substance] therein or thereon to such extent as he finds necessary for the protection of public health."[1] By instead reading the section to mean that "the Secretary shall promulgate regulations . . . to such extent as he finds necessary," the Court ignores the import of the words immediately following, which specify the effect of the "limits *so* fixed"—*i. e.*, fixed by "limiting the quantity [of the poisonous substance] therein or thereon to such extent as he finds necessary for the protection of public health"—which can only mean that the qualification modifies the *limits* set by regulation rather than the *duty* to regulate. In addition, the Court's construction, by skipping over the words "limiting the quantity therein or thereon," renders them superfluous and of no operative force or effect. Indeed, the Court renders the very language it construes superfluous, because reading the provision to authorize (rather than mandate) the promulgation of regulations assigns it an office already filled by the general rulemaking authority conferred later in the Food, Drug, and Cosmetic Act. See 21 U. S. C. § 371(a).[2] If Congress intended the Secretary to have unbridled authority to proceed with action levels, instead of with formal regulations, there was no need to enact this part of § 346 at all. This is plainly a case in which "the intent of Congress is clear [and] the court, as well as the agency, must give effect to the

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[1] This interpretation is in accord with the Committee Report on the House bill, which became the Food, Drug, and Cosmetic Act of 1938. The Report states that "[t]he addition of poison to foods is prohibited except where such addition is necessary or cannot be avoided; and in such cases tolerances *are* provided limiting the amount of added poison to the extent necessary to safeguard the public health." H. R. Rep. No. 2139, 75th

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Cong., 3d Sess., pt. 1, p. 2 (1938) (emphasis added). By using the present tense, the Report makes clear that the qualifying language is operative when regulations *are* promulgated—to limit the amount of poison "to the extent necessary to safeguard the public health." The qualifying language thus defines the standard by which *tolerances* are to be determined and not the occasions on which *regulations* are to be promulgated.

[2] The Court does not deny that the specific language which it construes—the clause providing that "the Secretary shall promulgate regulations" setting tolerance levels—is superfluous under its view of the Act. See *ante*, at 983–984. It instead emphasizes that a later sentence in § 346 which prescribes the legal *effect* of tolerance-setting regulations remains effective. But since tolerances may be promulgated pursuant to § 371(a) as well as § 346, the Court's response merely underscores the fact that its construction of the "shall promulgate" clause to authorize rather than to require such rulemaking renders it redundant to the general rulemaking authority conferred by § 371(a).

unambiguously expressed intent of Congress." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984).[3]

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[3] Because Congress explicitly required the Commissioner to promulgate regulations for added, unavoidable contaminants, that should be "the end of the matter." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S., at 842. The Commissioner's "longstanding" practice to the contrary does not help his legal position. For even if it were true that the Commissioner has from time to time announced an "action level" to advise the industry when he intended to institute enforcement proceedings concerning certain deleterious substances, the fact that the FDA had never actually addressed in any detail the statutory authorization under which it took such action means that its plea for deference should fail for the reasons carefully stated in *SEC* v. *Sloan*, 436 U. S. 103, 117–118 (1978):

"The Commission next argues that its interpretation of the statute—that the statute authorizes successive suspension orders—has been both consistent and longstanding, dating from 1944. It is thus entitled to great deference. See *United States* v. *National Assn. of Securities Dealers*, 422 U. S. 694, 710 (1975); *Saxbe* v. *Bustos*, 419 U. S. 65, 74 (1974).

"While this undoubtedly is true as a general principle of law, it is not an argument of sufficient force in this case to overcome the clear contrary indications of the statute itself. In the first place it is not apparent from the record that on any of the occasions when a series of consecutive summary suspension orders was issued the Commission actually addressed in any detail the statutory authorization under which it took that action.

* * * * *

"[S]ince this Court can only speculate as to the Commission's reasons for reaching the conclusion that it did, the mere issuance of consecutive summary suspension orders, without a concomitant exegesis of the statutory authority for doing so, obviously lacks 'power to persuade' as to the existence of such authority. [*Adamo Wrecking Co.* v. *United States*, 434 U. S. 275, 287–288, n. 5 (1978)]."

As we emphasized in *FMC* v. *Seatrain Lines, Inc.*, 411 U. S. 726, 745 (1973), "an agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate." Instead, "our clear duty in such a situation is to reject the administrative interpretation of the statute." *SEC* v. *Sloan*, 436 U. S., at 119.

The *Sloan* case also provides an adequate answer to the argument that Congress has revisited the statute from time to time without condemning the FDA's "action level" practice:

The task of interpreting a statute requires more than merely inventing an ambiguity and invoking administrative deference. A statute is not "unclear unless we think there are decent arguments for each of two competing interpretations of it." R. Dworkin, Law's Empire 352 (1986). Thus, to say that the statute is susceptible of two meanings, as does the Court, is not to say that either is acceptable. Furthermore, to say that the Commissioner's interpretation of the statute merits deference, as does the Court, is not to say that the singularly judicial role of marking the boundaries of agency choice is at an end. As Justice Frankfurter reminds us, "[t]he purpose of construction being the ascertainment of meaning, every consideration brought to bear for the solution of that problem must be devoted to that end alone." Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 529 (1947). It is not "a ritual to be observed by unimaginative adherence to well-worn professional phrases." *Ibid.* "Nor can canons of construction save us from the anguish of judgment." *Id.*, at 544. The Court, correctly self-conscious of the limits of the judicial role, employs a reasoning so formulaic that it trivializes the art of judging.

I respectfully dissent.

"We are extremely hesitant to presume general congressional awareness of the Commission's construction based only upon a few isolated statements in the thousands of pages of legislative documents. That language in a Committee Report, without additional indication of more widespread congressional awareness, is simply not sufficient to invoke the presumption in a case such as this. For here its invocation would result in a construction of the statute which not only is at odds with the language of the section in question and the pattern of the statute taken as a whole, but also is extremely far reaching in terms of the virtually untrammeled and unreviewable power it would vest in a regulatory agency." *Id.*, at 121.

REPORTER'S NOTE

The next page is purposely numbered 1101. The numbers between 988 and 1101 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM MAY 5 THROUGH JUNE 16, 1986

MAY 5, 1986

Appeals Dismissed

No. 85-1425. REPUBLICAN PARTY OF HAWAII ET AL. *v.* MINK ET AL. Appeal from Sup. Ct. Haw. dismissed for want of substantial federal question. Reported below: 68 Haw. ——, 711 P. 2d 723.

No. 85-6104. CORDOVA *v.* TEXAS. Appeal from Ct. Crim. App. Tex. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 698 S. W. 2d 107.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Certiorari Granted—Vacated and Remanded

No. 84-1783. JORDAN *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Skipper* v. *South Carolina*, *ante*, p. 1. Reported below: 464 So. 2d 475.

No. 84-1942. NATIONWIDE MUTUAL INSURANCE CO. *v.* CLAY. Sup. Ct. Ala. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Aetna Life Insurance Co.* v. *Lavoie*, 475 U. S. 813 (1986). Reported below: 469 So. 2d 533.

No. 85-5087. ELMORE *v.* SOUTH CAROLINA. Sup. Ct. S. C. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Skipper* v. *South Carolina*, *ante*, p. 1. Reported below: 286 S. C. 70, 332 S. E. 2d 762.

No. 85–5339. JONES *v.* SOUTH CAROLINA. Sup. Ct. S. C. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Skipper* v. *South Carolina, ante,* p. 1. Reported below: 288 S. C. 1, 340 S. E. 2d 782.

No. 85–5411. PLEMMONS *v.* SOUTH CAROLINA. Sup. Ct. S. C. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Skipper* v. *South Carolina, ante,* p. 1. Reported below: 286 S. C. 78, 332 S. E. 2d 765.

No. 85–6063. VALLE *v.* FLORIDA. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Skipper* v. *South Carolina, ante,* p. 1. Reported below: 474 So. 2d 796.

Miscellaneous Orders

No. – – ——. LESLIE *v.* UNITED STATES. Motion to direct the Clerk to file a petition for writ of certiorari which does not comply with the Rules of this Court denied.

No. A–760. SMITH *v.* UNITED STATES. Application for bail pending appeal, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. A–804. SEABOARD SYSTEM RAILROAD, INC. *v.* PAGE. Sup. Ct. Ala. Application for stay pending appeal, presented to JUSTICE POWELL, and by him referred to the Court, denied. JUSTICE BLACKMUN would grant the application.

No. D–553. IN RE DISBARMENT OF VELASQUEZ. It is ordered that Ray Velasquez, of Marlow Heights, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–556. IN RE DISBARMENT OF SODOWICK. It is ordered that Michael Samuel Sodowick, of West Caldwell, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 81, Orig. KENTUCKY *v.* INDIANA ET AL. Accounting of the Special Master is received and ordered filed. The Special

Master appointed by the Court is discharged with the thanks of the Court. [For earlier decision herein, see, *e. g.*, 474 U. S. 1.]

No. 84–1947. CERBONE, JUSTICE OF THE VILLAGE COURT, VILLAGE OF MT. KISCO, NEW YORK, ET AL. *v.* CONWAY. C. A. 2d Cir. [Certiorari granted, 474 U. S. 1100.] Motion of petitioners for divided argument denied.

No. 85–488. OHIO CIVIL RIGHTS COMMISSION ET AL. *v.* DAYTON CHRISTIAN SCHOOLS, INC., ET AL. C. A. 6th Cir. [Probable jurisdiction postponed, 474 U. S. 978.] Motion of appellants for leave to file a supplemental brief after argument granted.

No. 85–1524. HUBBARD BROADCASTING, INC. *v.* SOUTHERN SATELLITE SYSTEMS, INC., ET AL. C. A. 8th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 85–6562. BAXTER *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. D. C. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until May 27, 1986, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 85–6628. IN RE BURNEY. Petition for writ of habeas corpus denied.

Probable Jurisdiction Noted

No. 85–1513. EDWARDS, GOVERNOR OF LOUISIANA, ET AL. *v.* AGUILLARD ET AL. Appeal from C. A. 5th Cir. Probable jurisdiction noted. Reported below: 765 F. 2d 1251.

Certiorari Granted

No. 85–1140. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. *v.* BUELL. C. A. 9th Cir. Certiorari granted. Reported below: 771 F. 2d 1320.

No. 85-1517 (A-619). COLORADO *v.* SPRING. Sup. Ct. Colo. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Application for stay, presented to JUSTICE WHITE, and by him referred to the Court, is granted pending the issuance of the mandate of this Court. Reported below: 713 P. 2d 865.

Certiorari Denied. (See also No. 85-6104, *supra.*)

No. 85-550. UNION OIL COMPANY OF CALIFORNIA *v.* SPAETH. C. A. 10th Cir. Certiorari denied. Reported below: 762 F. 2d 865.

No. 85-695. ILLINOIS CENTRAL GULF RAILROAD CO. *v.* COLEMAN. Sup. Ct. Ala. Certiorari denied. Reported below: 475 So. 2d 498.

No. 85-751. MOTION PICTURE LABORATORY TECHNICIANS & FILM TAPE EDITORS LOCAL 780 OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES & MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, AFL-CIO *v.* NATIONAL AERONAUTICS AND SPACE ADMINISTRATION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 1167.

No. 85-859. SULLIVAN *v.* TEXAS. Ct. App. Tex., 1st Sup. Jud. Dist. Certiorari denied. Reported below: 678 S. W. 2d 162.

No. 85-946. KERR-MCGEE CORP. ET AL. *v.* SILKWOOD, ADMINISTRATOR OF THE ESTATE OF SILKWOOD. C. A. 10th Cir. Certiorari denied. Reported below: 769 F. 2d 1451.

No. 85-1083. MOECKLY *v.* UNITED STATES; and
No. 85-6019. COULOMBE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 769 F. 2d 453.

No. 85-1223. KIMMEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 777 F. 2d 290.

No. 85-1268. MASSMAN CONSTRUCTION CO. *v.* TENNESSEE VALLEY AUTHORITY. C. A. 6th Cir. Certiorari denied. Reported below: 769 F. 2d 1114.

No. 85-1333. NIMROD MARKETING (OVERSEAS) LTD. ET AL. *v.* TEXAS ENERGY INVESTMENT CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 769 F. 2d 1076.

No. 85-1354. DiBernardo et al. *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 775 F. 2d 1470.

No. 85-1381. Heller *v.* United States et al. C. A. 3d Cir. Certiorari denied. Reported below: 776 F. 2d 92.

No. 85-1488. Lignarolo et al. *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 971.

No. 85-1506. Quansah *v.* CTS Printex Corp. C. A. 9th Cir. Certiorari denied. Reported below: 779 F. 2d 56.

No. 85-1511. Betts *v.* Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois. Sup. Ct. Ill. Certiorari denied. Reported below: 109 Ill. 2d 154, 485 N. E. 2d 1081.

No. 85-1515. Russell *v.* Texas. Ct. App. Tex., 1st Sup. Jud. Dist. Certiorari denied.

No. 85-1521. Smith *v.* Office of Personnel Management. C. A. 5th Cir. Certiorari denied. Reported below: 778 F. 2d 258.

No. 85-1522. Miller *v.* City of Chicago et al. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 188.

No. 85-1526. Gopal *v.* California. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 171 Cal. App. 3d 524, 217 Cal. Rptr. 487.

No. 85-1536. Angel et ux. *v.* Martinson, Judge, Superior Court of San Diego County (Renn, Real Party in Interest). Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 85-1539. Sandhu *v.* Aamco Transmissions, Inc. C. A. 6th Cir. Certiorari denied. Reported below: 782 F. 2d 1043.

No. 85-1542. Orleans *v.* City of Wildwood Housing Authority et al. C. A. 3d Cir. Certiorari denied. Reported below: 780 F. 2d 1016.

No. 85-1603. Strozzi *v.* Colorado. Ct. App. Colo. Certiorari denied. Reported below: 712 P. 2d 1100.

No. 85-1619. Redmond *v.* United States. Ct. Mil. App. Certiorari denied. Reported below: 21 M. J. 319.

No. 85-1638. Law Mathematics & Technology, Inc. *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 779 F. 2d 675.

No. 85-5965. Clark *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 85-6080. Williams *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 768 F. 2d 809.

No. 85-6124. Johnson *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 779 F. 2d 47.

No. 85-6256. Green *v.* California. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 85-6269. Taylor *v.* Tennessee. Ct. Crim. App. Tenn. Certiorari denied.

No. 85-6271. Jones *v.* Cuyler et al. C. A. 3d Cir. Certiorari denied. Reported below: 780 F. 2d 1015.

No. 85-6277. Lawrence *v.* Missouri. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 700 S. W. 2d 111.

No. 85-6346. Boggs *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 775 F. 2d 582.

No. 85-6369. Keller *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 2d 1029.

No. 85-6373. Howard *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 779 F. 2d 47.

No. 85-6378. Clements *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 135 Ill. App. 3d 1001, 482 N. E. 2d 675.

No. 85-6425. Burnett *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 777 F. 2d 593.

No. 85-6458. Cook *v.* United States. C. A. 9th Cir. Certiorari before judgment denied.

No. 85-6504. Wood *v.* Xerox Corp. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 2d 1030.

No. 85-6508. Frazar *v.* Lowe. C. A. 5th Cir. Certiorari denied. Reported below: 778 F. 2d 788.

No. 85–6515. KALEC *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied.

No. 85–6516. SAVAGE *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 85–6524. WASHINGTON *v.* ANGELONE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 85–6526. COLE *v.* MISSOURI. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 701 S. W. 2d 489.

No. 85–6528. DAY *v.* POPE, FORMER CHIEF JUSTICE, SUPREME COURT OF TEXAS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 85–6529. COULVERSON *v.* OHIO ADULT PAROLE AUTHORITY. C. A. 6th Cir. Certiorari denied. Reported below: 758 F. 2d 652.

No. 85–6530. YELLEN *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 85–6533. PICCIOTTI *v.* ROBERTS, NEW YORK STATE COMMISSIONER OF LABOR. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied.

No. 85–6534. ORTH *v.* HOUSEWRIGHT, DIRECTOR, NEVADA DEPARTMENT OF PRISONS. Sup. Ct. Nev. Certiorari denied. Reported below: 101 Nev. 961.

No. 85–6544. KIMSEY *v.* CELESTE, GOVERNOR OF OHIO, ET AL. Sup. Ct. Colo. Certiorari denied.

No. 85–6548. RYAN *v.* STEPHEN. Sup. Ct. Tex. Certiorari denied.

No. 85–6560. WATSON *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 784 F. 2d 722.

No. 85–6589. BOLES *v.* DEPARTMENT OF TRANSPORTATION. C. A. Fed. Cir. Certiorari denied. Reported below: 790 F. 2d 92.

No. 85–6594. EUSCH *v.* SKOW ET AL. C. A. 7th Cir. Certiorari denied.

No. 85–6596. WALKER *v.* CITY OF BOWLING GREEN, KENTUCKY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 785 F. 2d 311.

No. 85–6618. ANESI *v.* UNITED STATES DEPARTMENT OF AGRICULTURE. C. A. 8th Cir. Certiorari denied. Reported below: 786 F. 2d 1168.

No. 85–6652. GENNUSO *v.* EPPOLITO ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 1.

No. 85–6656. WATKINS *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 21 M. J. 224.

No. 85–426. SAVE THE DUNES COUNCIL, INC. *v.* UNITED STATES ET AL. C. A. 7th Cir. Motion of Sierra Club for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 754 F. 2d 855.

No. 85–953. CAGLE *v.* CARLSON ET AL. Ct. App. Ariz. Certiorari denied. JUSTICE WHITE and JUSTICE POWELL would grant certiorari. Reported below: 146 Ariz. 292, 705 P. 2d 1343.

No. 85–1362. STERN ET AL. *v.* TARRANT COUNTY HOSPITAL DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 778 F. 2d 1052.

No. 85–1518. VOLKSWAGEN OF AMERICA ET AL. *v.* ROSSELL, GUARDIAN AD LITEM OF KENNON, A MINOR. Sup. Ct. Ariz. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 147 Ariz. 160, 709 P. 2d 517.

No. 85–1490. BASCH ET AL. *v.* WESTINGHOUSE CORP. C. A. 4th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 777 F. 2d 165.

No. 85–1801. LARSON ET AL. *v.* FARGO WOMEN'S HEALTH ORGANIZATION, INC., ET AL. Appeal from Sup. Ct. N. D. Motion of appellants to treat the jurisdictional statement as a petition for writ of certiorari granted. Certiorari denied. Reported below: 381 N. W. 2d 176.

No. 85-5881. HARRIMAN *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 474 So. 2d 1304.

No. 85-6276. BUNDY *v.* FLORIDA. Sup. Ct. Fla.;
No. 85-6325. JOHNSON *v.* MISSISSIPPI. Sup. Ct. Miss.;
No. 85-6511. ADAMS *v.* AIKEN, WARDEN, ET AL. Ct. Common Pleas of York County, S. C.;
No. 85-6512. SPANN *v.* SOUTH CAROLINA. Ct. Common Pleas of York County, S. C.; and
No. 85-6554. YOUNG *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: No. 85-6276, 455 So. 2d 330; No. 85-6325, 477 So. 2d 196; No. 85-6554, 701 S. W. 2d 429.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 85-1124. CHRISTENSEN *v.* UNITED STATES (two cases), 475 U. S. 1018;
No. 85-5634. BERNARD *v.* BERNARD ET AL., 474 U. S. 1103;
No. 85-5903. BERNARD *v.* WARDEN ET AL., 474 U. S. 1104;
No. 85-6284. NELSON *v.* VETERANS ADMINISTRATION, 475 U. S. 1087;
No. 85-6368. IN RE KIERSTEAD, 475 U. S. 1094; and
No. 85-6371. IN RE KARRIEM ET AL., 475 U. S. 1094. Petitions for rehearing denied.

No. 85-1212. OLEN *v.* PURDUE ET AL., 475 U. S. 1065. Petition for rehearing denied. JUSTICE BRENNAN took no part in the consideration or decision of this petition.

MAY 14, 1986

Miscellaneous Order

No. A-872. PINKERTON *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant the application for stay in order to give the applicant time to file a petition for writ of certiorari, and would grant the petition and vacate the sentence in this case.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Applicant seeks a stay of execution, claiming that the Eighth and Fourteenth Amendments are offended by the State's attempt to execute him for a crime he committed while a juvenile. This Court has not yet considered whether imposition of the death penalty for a minor's crimes is so antagonistic to civilized notions of morality as to transgress the bounds imposed by the Constitution. I believe it is time for this Court to address this issue of profound significance. See *Roach* v. *Aiken*, 474 U. S. 1039 (1986) (BRENNAN, J., joined by MARSHALL, J., dissenting). Accordingly, I would grant the stay of execution in order to afford Pinkerton an opportunity to present his claim in a petition for certiorari.

MAY 19, 1986

Dismissal Under Rule 53

No. 85-777. NATIONAL FEDERATION OF FEDERAL EMPLOYEES *v.* DEFENSE LANGUAGE INSTITUTE. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 767 F. 2d 1398.

Appeals Dismissed

No. 85-1257. ROGERS ET AL. *v.* CHEYENNE AIRPORT BOARD ET AL. Appeal from Sup. Ct. Wyo. dismissed for want of substantial federal question. Reported below: 707 P. 2d 717.

No. 85-1537. MUKA *v.* CARTER, CHIEF DISCIPLINARY COUNSEL. Appeal from Sup. Ct. R. I. dismissed for want of substantial federal question. Reported below: 502 A. 2d 327.

No. 85-1584. NIEDZWIECKI *v.* CIRCUIT PROTECTIVE DEVICES, DIVISION OF WESTINGHOUSE ELECTRIC CORP. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 795 F. 2d 79.

No. 85–1606. Whalers' Village Club *v.* California Coastal Commission. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 173 Cal. App. 3d 240, 220 Cal. Rptr. 2.

No. 85–1612. De Nardo *v.* Murphy et al. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 781 F. 2d 1345.

No. 85–6573. Hunter *v.* Ellinwood. Appeal from Sup. Ct. N. M. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85–6674. In re Dyson. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85–6688. Bury *v.* City of Lakeland, Florida, et al. Appeal from C. A. 11th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 781 F. 2d 904.

No. 85–1596. Stein Distributing Co., Inc. *v.* Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Justice White and Justice Rehnquist would postpone jurisdiction to a hearing of the case on the merits. Reported below: 779 F. 2d 1407.

Certiorari Granted—Vacated and Remanded

No. 84–2026. Lockhart, Director, Arkansas Department of Correction *v.* Pitts. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Lockhart* v. *McCree*, *ante*, p. 162. Reported below: 753 F. 2d 689.

No. 84–2027. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION *v.* RUIZ ET AL. C. A. 8th Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Lockhart* v. *McCree*, *ante*, p. 162. Reported below: 754 F. 2d 254.

No. 84–2028. SARGENT, WARDEN *v.* WOODARD. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Lockhart* v. *McCree*, *ante*, p. 162. Reported below: 753 F. 2d 694.

No. 85–5768. GRIFFIN *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Cabana* v. *Bullock*, 474 U. S. 376 (1986). Reported below: 760 F. 2d 1505.

Miscellaneous Orders

No. A–800. KINNEY *v.* KINNEY. App. Ct. Conn. Application for stay, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. A–825. SHUMATE *v.* PATTERSON. C. A. 4th Cir. Application for stay of mandate, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A–853 (85–1609). HASTINGS, UNITED STATES DISTRICT JUDGE, ET AL. *v.* GODBOLD, CHIEF JUDGE, UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, ET AL. C. A. 11th Cir. Application of Investigating Committee for order vacating stay entered by the United States Court of Appeals for the Eleventh Circuit, presented to JUSTICE POWELL, and by him referred to the Court, denied.

No. D–526. IN RE DISBARMENT OF DOBBS. Disbarment entered. [For earlier order herein, see 474 U. S. 917.]

No. D–545. IN RE DISBARMENT OF WILLIS. Disbarment entered. [For earlier order herein, see 475 U. S. 1003.]

No. D–547. IN RE DISBARMENT OF MAGRUDER. Disbarment entered. [For earlier order herein, see 475 U. S. 1063.]

No. 85–1027. ARIZONA *v.* HICKS. Ct. App. Ariz. [Certiorari granted, 475 U. S. 1107.] Motion for appointment of counsel granted, and it is ordered that John William Rood III, Esquire, of Phoenix, Ariz., be appointed to serve as counsel for respondent in this case.

No. 85–1792. BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES *v.* RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD CO. C. A. 4th Cir.; and

No. 85–1852. BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES *v.* BURLINGTON NORTHERN RAILROAD CO. ET AL. C. A. 7th Cir. Motion of petitioner to expedite consideration of the petitions for writs of certiorari before judgment denied.

No. 85–6702. IN RE MUELLER. Petition for writ of habeas corpus denied.

No. 85–6606. IN RE BASALYGA. Petition for writ of mandamus denied.

No. 85–6580. IN RE OSIPOVA. Petition for writ of prohibition denied.

Probable Jurisdiction Noted

No. 85–1244. CITY OF PLEASANT GROVE *v.* UNITED STATES. Appeal from D. C. D. C. Probable jurisdiction noted. Reported below: 623 F. Supp. 782.

No. 85–1370. ARKANSAS WRITERS' PROJECT, INC. *v.* RAGLAND, COMMISSIONER OF REVENUE OF ARKANSAS. Appeal from Sup. Ct. Ark. Probable jurisdiction noted. Reported below: 287 Ark. 155, 697 S. W. 2d 94 and 698 S. W. 2d 802.

No. 85–1530. BROCK, SECRETARY OF LABOR, ET AL. *v.* ROADWAY EXPRESS, INC. Appeal from D. C. N. D. Ga. Probable jurisdiction noted. Reported below: 624 F. Supp. 197.

Certiorari Granted

No. 85–1360. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO, ET AL. *v.* HECHLER. C. A. 11th Cir. Certiorari granted. Reported below: 772 F. 2d 788.

No. 85-899. CONNECTICUT *v.* BARRETT. Sup. Ct. Conn. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 197 Conn. 50, 495 A. 2d 1044.

No. 85-1409. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* YUCKERT. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 774 F. 2d 1365.

Certiorari Denied. (See also Nos. 85-1584, 85-1606, 85-1612, 85-6573, 85-6674, 85-6688, and 85-1596, *supra.*)

No. 85-860. BIASINI *v.* NEW YORK. County Court of Montgomery County, N. Y. Certiorari denied.

No. 85-1190. ASSOCIATED GAS DISTRIBUTORS ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL.; and

No. 85-1207. TRANSCONTINENTAL GAS PIPE LINE CORP. ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 769 F. 2d 1053.

No. 85-1210. SANTIESTEBAN *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied.

No. 85-1219. TRANSWESTERN PIPELINE CO. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL.;

No. 85-1236. ANR PIPELINE CO. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL.;

No. 85-1237. TEXAS EASTERN TRANSMISSION CORP. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL.;

No. 85-1250. TRUNKLINE GAS CO. ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL.; and

No. 85-1252. ARKLA ENERGY RESOURCES, A DIVISION OF ARKLA, INC. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 248 U. S. App. D. C. 231, 770 F. 2d 1144.

No. 85-1231. PASSARO *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 774 F. 2d 456.

No. 85-1283. HAYSSEN ET AL. *v.* BOARD OF ZONING ADJUSTMENTS OF THE COUNTY OF SONOMA (BERRY, REAL PARTY IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 171 Cal. App. 3d 400, 217 Cal. Rptr. 464.

No. 85-1285. BAILEY *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 341 Pa. Super. 611, 491 A. 2d 915.

No. 85-1289. VEILLETTE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 778 F. 2d 899.

No. 85-1335. GILMERE, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF PATILLO *v.* CITY OF ATLANTA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 774 F. 2d 1495.

No. 85-1357. BRAUER *v.* COLORADO. Sup. Ct. Colo. Certiorari denied.

No. 85-1373. MASSMAN CONSTRUCTION CO. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 776 F. 2d 1065.

No. 85-1387. CESARONI ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 780 F. 2d 1031.

No. 85-1389. LONE PINE STEERING COMMITTEE ET AL. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY. C. A. 3d Cir. Certiorari denied. Reported below: 777 F. 2d 882.

No. 85-1443. CORDIS CORP. *v.* MEDTRONIC, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 780 F. 2d 991.

No. 85-1466. JET INDUSTRIES, INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 777 F. 2d 303.

No. 85-1471. BOREAL RIDGE CORP. *v.* SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE (TIETJEN, REAL PARTY IN INTEREST). Sup. Ct. Nev. Certiorari denied. Reported below: 101 Nev. 945.

No. 85-1501. CORTLANDT NURSING HOME ET AL. *v.* AXELROD, COMMISSIONER OF HEALTH OF THE STATE OF NEW YORK, ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 66 N. Y. 2d 169, 486 N. E. 2d 785.

No. 85-1504. MARITIME OVERSEAS CORP. ET AL. *v.* BRUNNER. C. A. 5th Cir. Certiorari denied. Reported below: 779 F. 2d 296.

No. 85-1510. CHRISTY NEWSREEL SERVICES, INC. *v.* CITY OF ANN ARBOR. C. A. 6th Cir. Certiorari denied. Reported below: 780 F. 2d 1020.

No. 85-1533. DAVIS ET AL. *v.* CITY OF DALLAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 777 F. 2d 205.

No. 85-1543. FLINN *v.* GORDON. C. A. 11th Cir. Certiorari denied. Reported below: 775 F. 2d 1551.

No. 85-1548. DILLON *v.* LUTTERMAN ET AL. C. A. 10th Cir. Certiorari denied.

No. 85-1549. G. J. DEASY INVESTMENT, INC., DBA TEXAS VEHICLE MANAGEMENT *v.* MATTOX, ATTORNEY GENERAL OF TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 778 F. 2d 1091.

No. 85-1553. CHURCH OF SCIENTOLOGY FLAG SERVICE ORGANIZATION, INC. *v.* CITY OF CLEARWATER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 777 F. 2d 598.

No. 85-1554. SANTARELLI ET AL. *v.* ELLISON. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 125 Ill. App. 3d 306, 465 N. E. 2d 962.

No. 85-1556. STEINGRABER *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 334 Pa. Super. 589, 483 A. 2d 895.

No. 85-1558. EMPIREGAS, INC. OF ARDMORE *v.* HARDY ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 487 So. 2d 244.

No. 85-1570. DRURY, ADMINISTRATOR OF THE ESTATE OF ABDALLAH *v.* ABDALLAH ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 778 F. 2d 75.

No. 85-1572. LEE *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 177 Ga. App. 8, 338 S. E. 2d 445.

No. 85-1573. BRADFIELD *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 341 Pa. Super. 611, 491 A. 2d 915.

No. 85-1574. BURLINGTON NORTHERN RAILROAD CO. *v.* ANDERSON. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 700 S. W. 2d 469.

No. 85–1575. RIVERA *v.* ARIZONA. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 913.

No. 85–1576. WRIGHT ET AL. *v.* KECH–TV ET AL. Sup. Ct. Ore. Certiorari denied. Reported below: 300 Ore. 139, 707 P. 2d 1232.

No. 85–1577. DINWIDDIE ET AL. *v.* BOARD OF COUNTY COMMISSIONERS OF LEA COUNTY ET AL. Sup. Ct. N. M. Certiorari denied. Reported below: 103 N. M. 442, 708 P. 2d 1043.

No. 85–1578. MINAYA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 85–1582. GROSS *v.* GROSS. Sup. Ct. Ohio. Certiorari denied.

No. 85–1586. CAMPS *v.* LOUISIANA. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 476 So. 2d 864.

No. 85–1597. IVANCIC *v.* OLMSTEAD. Ct. App. N. Y. Certiorari denied. Reported below: 66 N. Y. 2d 349, 488 N. E. 2d 72.

No. 85–1598. A & A CONCRETE, INC., ET AL. *v.* WHITE MOUNTAIN APACHE TRIBE, DBA WHITE MOUNTAIN APACHE DEVELOPMENT ENTERPRISE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 781 F. 2d 1411.

No. 85–1607. GIBBS *v.* KING, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 779 F. 2d 1040.

No. 85–1615. BOOKER ET AL. *v.* THOMAS. C. A. 8th Cir. Certiorari denied. Reported below: 784 F. 2d 299.

No. 85–1627. MAYER *v.* DAVIS ET AL. Ct. App. Ohio, Summit County. Certiorari denied.

No. 85–1634. CONNER ET AL. *v.* SHELTER MUTUAL INSURANCE CO. C. A. 6th Cir. Certiorari denied. Reported below: 779 F. 2d 335.

No. 85–1636. O'DONNELL *v.* PAINE, JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 85-1647. RUBINSTEIN *v.* TEXAS. Ct. App. Tex., 10th Sup. Jud. Dist. Certiorari denied.

No. 85-1657. NELMS *v.* WEAVER ET UX. Sup. Ct. Tenn. Certiorari denied.

No. 85-1666. HOSFORD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 782 F. 2d 936.

No. 85-1675. KALISH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 780 F. 2d 506.

No. 85-1681. HECHT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 782 F. 2d 1032.

No. 85-1682. WARD *v.* UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION. C. A. Fed. Cir. Certiorari denied. Reported below: 776 F. 2d 1062.

No. 85-1703. STRANAHAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 85-1723. FESLER ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 781 F. 2d 384.

No. 85-5929. CASEY *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied.

No. 85-5951. OTERO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 2.

No. 85-5983. CHURCHILL *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 136 Ill. App. 3d 123, 482 N. E. 2d 355.

No. 85-6033. SHAH *v.* KERN COUNTY, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 774 F. 2d 1175.

No. 85-6138. WILKINS *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 776 F. 2d 1047.

No. 85-6187. LEE *v.* MILLER, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 85-6209. BERTON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 85–6252. BROWN *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 64 Md. App. 708.

No. 85–6254. FIGUEROA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 779 F. 2d 44.

No. 85–6292. CLIFFORD *v.* DAUGHERTY ET AL. C. A. 3d Cir. Certiorari denied.

No. 85–6347. BIRDSELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 775 F. 2d 645.

No. 85–6348. SAM *v.* LOUISIANA. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 473 So. 2d 908.

No. 85–6349. WHITE *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 780 F. 2d 1032.

No. 85–6357. HILL *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 489 A. 2d 1078.

No. 85–6366. JOHNSON *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 700 S. W. 2d 815.

No. 85–6381. WILSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 85–6383. BROOKS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 777 F. 2d 1141.

No. 85–6422. SHOOK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 779 F. 2d 53.

No. 85–6433. FORMAN *v.* BAER, CHAIRMAN, UNITED STATES PAROLE COMMISSION. C. A. 3d Cir. Certiorari denied. Reported below: 776 F. 2d 1156.

No. 85–6435. CAMACHO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 779 F. 2d 227.

No. 85–6442. TAYLOR *v.* WHITE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 85–6471. KLIER *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 300 Ore. 477, 713 P. 2d 1058.

No. 85-6509. BRYSINSKI *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 135 Ill. App. 3d 1160, 496 N. E. 2d 1274.

No. 85-6531. SPRAGGINS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 255 Ga. 195, 336 S. E. 2d 227.

No. 85-6542. FREEMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 761 F. 2d 549 and 782 F. 2d 853.

No. 85-6555. WILLIFORD *v.* YOUNG, SUPERINTENDENT, WAUPUN CORRECTIONAL INSTITUTION, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 779 F. 2d 405.

No. 85-6559. GRIFFIN *v.* VIRGINIA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 780 F. 2d 1018.

No. 85-6561. STEWART *v.* FOLTZ, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 782 F. 2d 1043.

No. 85-6563. BUFFALOE *v.* ANDERSON. Ct. Sp. App. Md. Certiorari denied. Reported below: 63 Md. App. 747.

No. 85-6565. GODBEE *v.* NEWSOME, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 773 F. 2d 1237.

No. 85-6566. FRIEND *v.* REES, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 779 F. 2d 50.

No. 85-6568. SMITH *v.* SCHROEDER, CHIEF JUSTICE, KANSAS SUPREME COURT, ET AL. C. A. 10th Cir. Certiorari denied.

No. 85-6570. DAY *v.* CONTINENTAL INSURANCE COS. C. A. 5th Cir. Certiorari denied.

No. 85-6571. FORD *v.* STEPHENSON, SUPERINTENDENT, CALEDONIA AND ODOM COMPLEX. C. A. 4th Cir. Certiorari denied. Reported below: 782 F. 2d 1034.

No. 85-6574. DAVIS *v.* BOSTON EDISON CO. ET AL. C. A. 1st Cir. Certiorari denied.

No. 85-6576. UNGER *v.* HOELEN. C. A. 4th Cir. Certiorari denied. Reported below: 785 F. 2d 306.

No. 85-6578. MORGAN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 116 App. Div. 2d 919, 498 N. Y. S. 2d 510.

No. 85–6583. Kim et al. *v.* Stroh, Director of Alcoholic Beverage Control, et al. Sup. Ct. Cal. Certiorari denied.

No. 85–6586. Wilder *v.* Estelle, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 2d 1029.

No. 85–6587. McFall *v.* Rees, Warden, et al. C. A. 6th Cir. Certiorari denied. Reported below: 786 F. 2d 1165.

No. 85–6588. Kiser *v.* Ohio. Sup. Ct. Ohio. Certiorari denied.

No. 85–6590. Hernandez *v.* City of Louisville, Kentucky, et al. C. A. 6th Cir. Certiorari denied. Reported below: 780 F. 2d 1021.

No. 85–6591. LaGrange *v.* Texas Department of Public Safety et al. C. A. 5th Cir. Certiorari denied. Reported below: 779 F. 2d 681.

No. 85–6592. Harris *v.* Abshire, Superintendent, Riverside Correctional Facility. C. A. 6th Cir. Certiorari denied. Reported below: 785 F. 2d 308.

No. 85–6605. Johnson *v.* Womack, Clerk, Supreme Court of Mississippi. C. A. 5th Cir. Certiorari denied. Reported below: 786 F. 2d 1160.

No. 85–6607. Bryson *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied. Reported below: 711 P. 2d 932.

No. 85–6608. Rosberg *v.* Goeres. C. A. 8th Cir. Certiorari denied. Reported below: 782 F. 2d 1050.

No. 85–6610. Myers *v.* Guillory, Warden, et al. C. A. 5th Cir. Certiorari denied. Reported below: 776 F. 2d 1046.

No. 85–6611. Tinney *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied. Reported below: 712 P. 2d 65.

No. 85–6613. Sellers *v.* Georgia. Ct. App. Ga. Certiorari denied. Reported below: 176 Ga. App. 681, 337 S. E. 2d 373.

No. 85–6614. Randall *v.* Superior Court of California, Riverside County. Sup. Ct. Cal. Certiorari denied.

No. 85-6617. KUNKEL *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 484 So. 2d 9.

No. 85-6619. HART *v.* HOLLAND, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 85-6621. HOLLINGSWORTH *v.* STEPHENSON, SUPERINTENDENT, CALEDONIA AND ODOM COMPLEX, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 779 F. 2d 46.

No. 85-6624. ALLEN *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 85-6625. DAY *v.* CMC CORP. C. A. 5th Cir. Certiorari denied.

No. 85-6629. MORRIS *v.* JACKSON PARK HOSPITAL. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 85-6632. SIMPSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 785 F. 2d 311.

No. 85-6651. LEE *v.* HARDAGE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 782 F. 2d 1035.

No. 85-6657. SHUMATE *v.* PATTERSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 782 F. 2d 1036.

No. 85-6666. DE VITO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 786 F. 2d 1149.

No. 85-6685. MARKOUSKI *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 795 F. 2d 79.

No. 85-6686. MORGAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 779 F. 2d 47.

No. 85-6690. RICHARDSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 782 F. 2d 1033.

No. 85-6691. MERCER *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 786 F. 2d 1165.

No. 85-6694. BOONE *v.* CASHION, SUPERINTENDENT OF NORTH CAROLINA DIVISION OF PRISONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 785 F. 2d 304.

No. 85–6701. Wilson *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 778 F. 2d 1017.

No. 85–6708. Jeffers *v.* Lockhart, Director, Arkansas Department of Correction. C. A. 8th Cir. Certiorari denied. Reported below: 782 F. 2d 1049.

No. 85–6711. Kaye *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 779 F. 2d 1461.

No. 85–6719. Nunez *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 85–6720. Glascoe *v.* United States. Ct. App. D. C. Certiorari denied.

No. 85–6722. Swanson *v.* Office of Personnel Management et al. C. A. Fed. Cir. Certiorari denied. Reported below: 785 F. 2d 322.

No. 85–6728. Womble *v.* Norton. Ct. App. D. C. Certiorari denied.

No. 85–6735. Vannerson et al. *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 786 F. 2d 221.

No. 85–6736. Creech *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 2d 1025.

No. 85–6740. Jimenez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 782 F. 2d 533.

No. 85–121. Kemp, Warden *v.* Young. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 760 F. 2d 1097.

No. 85–801. Wainwright, Secretary, Florida Department of Corrections *v.* Griffin. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 760 F. 2d 1505.

No. 85–1337. North Carolina *v.* Harbison. Sup. Ct. N. C. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 315 N. C. 175, 337 S. E. 2d 504.

No. 85-1590. KIRK, SECRETARY, NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES *v.* THOMAS S., BY HIS APPOINTED GUARDIAN AD LITEM, BROOKS. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 781 F. 2d 367.

No. 85-541. BARCLAYSAMERICAN/CREDIT, INC. *v.* QUILLER ET UX.;

No. 85-584. GRANT ET AL. *v.* GENERAL ELECTRIC CREDIT CORP.; and

No. 85-717. QUILLER ET UX. *v.* BARCLAYSAMERICAN/CREDIT, INC. C. A. 11th Cir. Motion of American Financial Services Association et al. for leave to file a brief as *amici curiae* in No. 85-541 granted. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this motion and these petitions. Reported below: Nos. 85-541 and 85-717, 727 F. 2d 1067 and 764 F. 2d 1400; No. 85-584, 764 F. 2d 1404.

No. 85-1186. SAMPSON *v.* GILMERE, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF PATILLO. C. A. 11th Cir. Certiorari denied. Reported below: 774 F. 2d 1495.

CHIEF JUSTICE BURGER, with whom JUSTICE O'CONNOR joins, dissenting.

On New Year's Day, 1980, Atlanta police responded to a report that Thomas Patillo had threatened the driver of a van with a gun after Patillo had nearly caused an accident with the van. Petitioner Sampson and a fellow police officer, Craig, responded to the call, and arrived at Patillo's residence. Patillo, who appeared to be inebriated, refused the officers' order to accompany them to the police car for questioning, and attempted to flee. The police officers then escorted Patillo from his residence by force. Some witnesses reported that at this point the officers began beating Patillo in the head but no evidence of head wounds was discovered. Patillo broke free of the officers' hold and reached for officer Craig's revolver. During the struggle that followed, Patillo lunged towards Officer Sampson. Sampson, believing that Patillo had the gun in his hand, shot Patillo twice at close range. Patillo died from these gunshot wounds.

Respondent is Patillo's sister, who filed this suit under 42 U. S. C. § 1983 on her own behalf and on behalf of Patillo's estate.

After a bench trial, the District Court concluded that Patillo's due process rights had been violated both by the alleged beating and by the shooting, and that Sampson's belief that his life was in danger was not objectively reasonable, and awarded damages against petitioner. A panel of the United States Court of Appeals for the Eleventh Circuit reversed the award of damages, reasoning that under *Parratt* v. *Taylor*, 451 U. S. 527 (1981), the availability of a state-law tort action against the police officers precluded relief under § 1983 for a due process violation. The panel decision was vacated and the case was listed before the Eleventh Circuit for en banc hearing. The en banc court affirmed the award of damages against the police officers. *Gilmere* v. *City of Atlanta*, 774 F. 2d 1495 (1985). Reasoning that *Parratt* barred only purely procedural due process claims for which state remedies are available, the Court of Appeals discerned two substantive constitutional bases for the imposition of § 1983 liability in this case. First, the court determined that Patillo's shooting deprived him of substantive due process by the excessive use of force. In reaching this conclusion, the Court of Appeals reasoned that any fear that Sampson had for his own life was legally insufficient to justify the use of deadly force because any fear on the officer's part was the fear of retaliation against his own unjustified physical abuse. Second, as an alternative holding, the Court of Appeals determined that Patillo's shooting was also an unconstitutional "seizure" in violation of this Court's holding in *Tennessee* v. *Garner*, 471 U. S. 1 (1985), that use of deadly force to arrest a nonviolent suspect violates the Fourth Amendment.

The Court of Appeals' holding that Patillo's shooting violates the Fourth Amendment despite Officer Sampson's fear for his life is plainly at odds with language in *Garner* emphasizing that the use of deadly force in effecting an arrest is constitutional when the officer has probable cause to believe that the suspect poses a threat to the officer. *Id.*, at 11–12. The Court of Appeals' holding conflicts with a holding of the Fifth Circuit that an officer's conduct which makes the need for deadly force more likely does not constitutionally disable the officer from later using deadly force to defend himself. *Young* v. *City of Killeen*, 775 F. 2d 1349 (1985).

Because the Court of Appeals' decision in this case misreads this Court's holding in *Garner*, and because the decision conflicts with the decision of the Fifth Circuit in *Young*, I would grant certiorari.

No. 85–1246. RAYMARK INDUSTRIES, INC. *v.* BATH IRON WORKS CORP. ET AL.;

No. 85–1253. EAGLE-PICHER INDUSTRIES, INC. *v.* UNITED STATES; and

No. 85–1288. RAYMARK INDUSTRIES, INC., ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: No. 85–1246, 772 F. 2d 1007; Nos. 85–1253 and 85–1288, 772 F. 2d 1023.

JUSTICE WHITE, dissenting.

In No. 85–1246, petitioner, an asbestos manufacturer, is the defendant in a products liability suit brought by the widow of a deceased employee of respondent Bath Iron Works' shipyard. Petitioner sought contribution from respondent on various theories, including a claim under § 5(b) of the Longshoremen's and Harbor Workers' Compensation Act, 86 Stat. 1263, 33 U. S. C. § 905(b). The United States Court of Appeals for the First Circuit held that § 5(b) covers only those torts that are within the reach of admiralty jurisdiction as defined in *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U. S. 249 (1972). *Drake* v. *Raymark Industries, Inc.*, 772 F. 2d 1007 (1985). The First Circuit concluded that ship construction does not satisfy the "maritime nexus" test of *Executive Jet.* As the First Circuit realized, its interpretation of the scope of § 5(b) conflicts with the decision in *Hall* v. *Hvide Hull No. 3*, 746 F. 2d 294 (CA5 1984), which holds that employees covered by the LHWCA who sue under § 5(b) need not satisfy the "maritime nexus" test of *Executive Jet* so long as the underlying event took place on a ship on navigable water.

In Nos. 85–1253 and 85–1288, which involve third-party claims by asbestos manufacturers against the United States as vessel owner and shipyard employer, the First Circuit followed its holding in *Drake*, *supra*, regarding the scope of § 5(b). *In re All Maine Asbestos Litigation (PNS Cases)*, 772 F. 2d 1023 (1985).

I would grant certiorari to resolve the conflict presented in these cases.

No. 85–1359. NORVELL, SHERIFF, ST. LUCIE JAIL, ET AL. *v.* MILLER. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 775 F. 2d 1572.

CHIEF JUSTICE BURGER, with whom JUSTICE REHNQUIST and JUSTICE O'CONNOR join, dissenting.

Miller was charged with "misapplication of funds" in connection with the 1978 construction of several homes. The Florida statute under which Miller was charged provides that one of the elements of the crime, the "intent to defraud," can be prima facie established by the "failure to pay for such labor, services or materials furnished for this specific improvement after receipt of such proceeds." Fla. Stat. § 713.34(3) (1985).

The state trial court instructed the jury that

> "[p]roof that the defendant failed to pay for such labor, services or materials for any specific improvement from the proceeds of any payment made to him for such specific improvements shall constitute prima facie evidence of intent to defraud. Prima facie evidence means evidence of such nature as is sufficient to establish a fact and which, if unrebutted, remains sufficient for that purpose."

Miller was found guilty and sentenced to 6 months in county jail and 14½ years' probation. After Miller's conviction was affirmed on direct appeal, he brought this federal habeas action. The District Court denied the application.

The Court of Appeals for the Eleventh Circuit reversed, 775 F. 2d 1572 (1985), holding that the jury instructions could have been interpreted as creating a "mandatory rebuttable presumption" in violation of *Francis* v. *Franklin*, 471 U. S. 307 (1985), and *Sandstrom* v. *Montana*, 442 U. S. 510 (1979). Although this holding was sufficient to dispose of the application, the court went on to hold that the statute under which Miller was convicted was unconstitutional. Since the improper jury instructions were a "verbatim" rendition of the statute, the court reasoned, the statute, like the instructions, must fail.

Even if the jury instructions were impermissible under *Franklin* and *Sandstrom*, by striking down the underlying statute the Court of Appeals' decision flies in the face of *Ulster County Court* v. *Allen*, 442 U. S. 140 (1979), where we considered a facial attack upon a New York statute on the grounds that it impermissibly shifted the burden of proof. As the Court explained, a facial attack to a statute on these grounds will fail if the statute creates only a "permissive inference," leaving the trier of fact free to credit or reject the inference. The application of the statute to a particular case, however, can be successfully challenged if there is no rational way the trier could make the connection permitted by the inference. On the other hand, a statute creating a "mandatory presumption" is "a far more troublesome evidentiary device" because it may "affect not only the strength of the 'no reasonable doubt' burden but also the placement of that burden; it tells the trier that he or they *must* find the elemental fact upon proof of the basic fact." *Id.*, at 157. To the extent that the trier of fact is forced to abide by the presumption irrespective of particular facts presented by the case, the analysis of the mandatory presumption's constitutional validity "is logically divorced from those facts and based on the presumption's accuracy in the run of cases." *Id.*, at 159. Because the statute in *Ulster County* created only a permissive inference, the Court held that the Court of Appeals erred in passing on the constitutionality of the statute "on its face." *Id.*, at 163.

The Court of Appeals' decision in this case striking down the statute cannot be reconciled with *Ulster County*. According to the Florida Supreme Court, the statute creates only a "permissive inference." *State* v. *Ferrari*, 398 So. 2d 804 (1981). A state trial court could, consistently with the statute as interpreted by the Florida Supreme Court, instruct the jury that it is free to either accept or reject the inference; that is, from the evidence that a contractor received advance payment for a particular project and did not use the money for the project, the jury could *but need not* infer that the contractor intended to defraud the owner. As we held in *Ulster County*, whether this kind of permissive inference unconstitutionally relieves the State of its burden of proof is to be determined on the facts of each case. But, because such an inference can be applied in a manner not repugnant to the Constitution, the Court of Appeals had no warrant to hold the Florida statute unconstitutional.

The Court of Appeals suggested that, while the Florida Supreme Court said that the statute created only a permissive inference, as a matter of federal law it created a mandatory rebuttable presumption. The Florida Supreme Court, however, is the final expositor of Florida law, not the Eleventh Circuit. Whether the troublesome phrase in the statute—"shall constitute prima facie evidence"—places the burden upon the defendant to rebut the State's showing is a question properly left to the Florida Supreme Court. Even if the Florida Supreme Court had not already declared that the statute created only a permissive inference, the Court of Appeals still should have allowed the Florida courts to interpret their statute to conform with federal constitutional requirements. And, even if the statute were incapable of such interpretation, the Florida courts should have been left free to make that determination in the first instance.

The holding of the Court of Appeals is not only incorrect but also completely gratuitous. After holding that the petition should be granted because of the flawed jury instruction, it had no reason to go on and take the drastic step of holding a state statute unconstitutional, thereby leaving the State with no means of retrying Miller. Accordingly, I would grant the petition and at least allow plenary consideration of the issue.

No. 85-1423. PRIVATE TRUCK COUNCIL OF AMERICA, INC., ET AL. *v.* QUINN, SECRETARY OF STATE OF MAINE, ET AL. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 503 A. 2d 214.

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE O'CONNOR join, dissenting.

In this case, the Supreme Judicial Court of Maine held that an allegation that a State has violated the Commerce Clause is not cognizable in an action under 42 U. S. C. § 1983. 503 A. 2d 214 (1986). This decision, while supported by the weight of authority, see, *e. g.*, *Consolidated Freightways Corp.* v. *Kassel*, 730 F. 2d 1139 (CA8), cert. denied, 469 U. S. 834 (1984), conflicts with the holding in *Kennecott Corp.* v. *Smith*, 637 F. 2d 181, 186, n. 5 (CA3 1980). I would grant certiorari to resolve this conflict.

This case also presents the question whether persons subjected to an unconstitutional tax, the nonpayment of which is a crime, may bring a refund action under the Fourteenth Amendment if no state refund procedure is available. The Supreme Judicial Court recognized that the Fourteenth Amendment may require a refund of unconstitutional taxes paid under compulsion. See *Carpenter* v. *Shaw*, 280 U. S. 363, 369 (1930); *Ward* v. *Board of County Comm'rs*, 253 U. S. 17, 24 (1920). However, the court rejected the "implied duress" theory of *Atchison, T. & S. F. R. Co.* v. *O'Connor*, 223 U. S. 280, 286 (1912), and held that petitioners have no right of recovery under the Fourteenth Amendment because they failed to present evidence that the State actually threatened them with arrest or seizure of personal property if they failed to pay the tax in question. Because this holding calls into question the continuing vitality of *Atchison*, I would grant certiorari on this issue as well.

No. 85-1617. EMERSON ELECTRIC CO. *v.* SWENSON ET AL. Sup. Ct. Minn. Motion of Chamber of Commerce of the United States et al. for leave to file a brief as *amici curiae* granted. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 374 N. W. 2d 690.

No. 85-5273. DAVID *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 468 So. 2d 1126 and 1133.

No. 85-5793. SKAGGS *v.* KENTUCKY (two cases). Sup. Ct. Ky.;

No. 85-6525. JOHNSON *v.* TENNESSEE. Sup. Ct. Tenn.;

No. 85-6630. ROGERS, AKA HEYDUK *v.* NEVADA. Sup. Ct. Nev.; and

No. 85-6631. FARMER *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: No. 85-5793 (first case), 694 S. W. 2d 672; No. 85-6525, 698 S. W. 2d 631; No. 85-6630, 101 Nev. 457, 705 P. 2d 664; No. 85-6631, 101 Nev. 419, 705 P. 2d 149.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 85-6556. ANDERSON *v.* SPRING LAKE PARK PARTNERSHIP. C. A. 8th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 782 F. 2d 1048.

No. 85-6930 (A-889). STRAIGHT *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, denied. Certiorari denied. JUSTICE BLACKMUN would deny the state habeas petition without prejudice to the presentation of claims on federal habeas. Reported below: 488 So. 2d 530.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay and the petition for writ of certiorari and would vacate the death sentence in this case.

Rehearing Denied

No. 85-24. MARYLAND *v.* ELFADL, 475 U. S. 1081;

No. 85-1096. VAN SANT *v.* UNITED STATES POSTAL SERVICE ET AL., 475 U. S. 1082;

No. 85-1272. MYER *v.* PACIFIC FEDERAL SAVINGS & LOAN ASSN., 475 U. S. 1084;

No. 85-1296. ROSENBAUM *v.* ROSENBAUM, 475 U. S. 1078;

No. 85-5375. BLANKS *v.* GEORGIA, 475 U. S. 1090;

No. 85-5729. HOWELL *v.* MARYLAND, 475 U. S. 1110;

No. 85-5890. BAIG *v.* UNITED STATES, 474 U. S. 1103;

No. 85-5920. POOL *v.* ARMONTROUT, WARDEN, 475 U. S. 1110;

No. 85-5978. CLARK *v.* STATE TREASURER'S OFFICE EMPLOYER ET AL., 475 U. S. 1024;

No. 85-6183. IN RE MAY, 475 U. S. 1044;

No. 85-6224. DRINKWINE *v.* FEDERATED PUBLICATIONS, INC., ET AL., 475 U. S. 1087;

No. 85-6229. COLLINS *v.* GEORGIA, 475 U. S. 1090;

No. 85-6260. LYNCH *v.* JOHNSON ET AL., 475 U. S. 1087;

No. 85-6310. GREGORY *v.* SOLEM, WARDEN, 475 U. S. 1088;

No. 85-6311. HOUGHTON *v.* CODER ET AL., 475 U. S. 1088;

No. 85-6367. CHOAT *v.* ROME INDUSTRIES, INC., ET AL., 475 U. S. 1097;

No. 85-6375. KNIES *v.* WISCONSIN, 475 U. S. 1110;

No. 85-6403. DYSON *v.* TEXAS A & M UNIVERSITY, 475 U. S. 1113; and

No. 85-6460. PURCELL ET UX. *v.* BOARD OF IMMIGRATION APPEALS, 475 U. S. 1098. Petitions for rehearing denied.

No. 84–773. BENDER ET AL. *v.* WILLIAMSPORT AREA SCHOOL DISTRICT ET AL., 475 U. S. 534. Motion of Bender et al. for leave to file petition for rehearing denied. Petition for rehearing denied.

MAY 20, 1986

Miscellaneous Orders

No. A–891. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* ZEIGLER. Application of the Attorney General of Florida for an order to dissolve a stay of execution of sentence of death entered by the United States Court of Appeals for the Eleventh Circuit, presented to JUSTICE POWELL, and by him referred to the Court, denied.

No. A–892 (85–6947). STRAIGHT *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. The order heretofore entered staying the execution of the sentence of death until 5 p.m., May 20, 1986, is vacated. The application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, is denied. JUSTICE STEVENS would grant the application for stay of execution.

JUSTICE POWELL, joined by THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR, concurring in the denial of a stay.

In view of the discussion in the dissents, I write to summarize my reasons for voting to deny a stay in this case.

Ronald Straight is here on his second federal habeas corpus petition. In his first petition, Straight argued that he was handicapped by the reasonable belief of trial counsel and the trial judge that Florida law barred the introduction of nonstatutory mitigating evidence at capital sentencing proceedings. Cf. *Lockett* v. *Ohio*, 438 U. S. 586 (1978). The District Court denied relief on this claim, and on Straight's other claims as well, and the Court of Appeals for the Eleventh Circuit affirmed. *Straight* v. *Wainwright*, 772 F. 2d 674 (1985). Less than seven weeks ago, this Court denied Straight's petition for certiorari, a petition that again raised his *Lockett* argument. 475 U. S. 1099.

In his second habeas petition, filed late yesterday, Straight raises the same substantive legal claim, and adds various new factual allegations in support. The District Court properly found that, to the extent Straight seeks to relitigate the same claims raised earlier, his petition should be dismissed under Habeas Corpus Rule 9(b) as a successive petition. The court also found that, to the extent that Straight sought to make new arguments that plainly could have been raised earlier, his petition was an abuse of the writ. See *Woodard* v. *Hutchins*, 464 U. S. 377, 378–380 (1984) (POWELL, J., joined by BURGER, C. J., and BLACKMUN, REHNQUIST, and O'CONNOR, JJ., concurring). The Court of Appeals found no error in the District Court's disposition, and denied a certificate of probable cause to appeal. The Court of Appeals granted a stay of execution until noon today to permit this Court to consider Straight's belated application for a stay and petition for certiorari.[1]

I find no basis for concluding that the District Court abused its discretion. Applicant has not offered any reason why he should be permitted to relitigate his *Lockett* claim, nor has he justified his previous failure to allege the supporting factual grounds on which he now relies. Thus, the District Court's decision to deny relief based on Rule 9 was plainly correct. That being the case, there is no ground for reaching the merits argument that the dissenting opinions now rely on.[2]

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[1] Acting in my capacity as Circuit Justice, I extended the stay of petitioner's execution until 5 p.m. today to allow fuller consideration of his stay application.

[2] JUSTICE BRENNAN contends that, because four Justices have voted to "hold" this case pending disposition of *Darden* v. *Wainwright*, No. 85–5319, the Court is obliged to stay applicant's execution in order that the case not be mooted. JUSTICE BRENNAN correctly notes that, in the past, the Court has ordinarily stayed executions when four Members have voted to *grant* certiorari, and he maintains that "[a] 'hold' is analogous to a decision to grant a petition for certiorari." *Post*, at 1135 (dissenting). In my view, this last assertion is incorrect on several levels. First and foremost, the Court often "holds" cases for reasons that have nothing to do with the merits of the cases being held, as when we wish not to "tip our hand" in advance of an opinion's announcement. Second, when certiorari is granted, *by definition* the Court's resolution of the issues presented in that case might affect the judgment rendered below. That is not necessarily true of held cases. The judgment in a held case may rest on a number of grounds sufficient to sustain it. In this case, my vote to deny Straight's petition for certiorari—and therefore not to hold the petition for *Darden*, *supra*—reflects my view that *no matter how Darden* is resolved, the judgment of the District Court will be unaffected. The reason for that conclusion is obvious: the District Court found that the pe-

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, and with whom JUSTICE BLACKMUN joins in all but the first paragraph, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), I would grant the stay application and the petition for certiorari and would vacate the sentence in this case.

But even if I did not hold this view, I would extend the stay of execution in this case until the Court acts on Straight's petition for certiorari in No. 85–6947. In that petition, Straight contends that the State of Florida's death penalty statute and the cases interpreting it prior to his trial resulted in the failure of the trial court to consider nonstatutory mitigating factors in violation of this Court's holding in *Lockett* v. *Ohio*, 438 U. S. 586 (1978). This issue is similar to one presented in *Darden* v. *Wainwright*, No. 85–5319, a case that has been argued but not yet decided by the Court, and other petitions that are before the Court that have not yet been acted upon.

It would be disturbing enough if the Court were to allow this execution to proceed without acting on the merits of Straight's petition for certiorari, since this would allow him to be executed despite the continuing possibility of relief from this Court. What the Court does here is far more alarming, however. For the fact is that in my view the Court *has* acted on the merits of Straight's petition. Four Justices have voted to "hold" Straight's petition because they believe that it presents an issue sufficiently similar to *Darden* to warrant delaying disposition of Straight's case until a decision is reached in that case. To deny a stay of execution in the face of this "hold" is, in my view, a wrong to which I may not be a silent witness.

A minority of the Justices has the power to grant a petition for certiorari over the objection of five Justices. The reason for this "antimajoritarianism" is evident: in the context of a preliminary 5-to-4 vote to deny, 5 give the 4 an opportunity to change at least one mind. Accordingly, when four vote to grant certiorari in a

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tition must be dismissed under Habeas Corpus Rule 9, and therefore did not reach the merits of applicant's claim. *Darden*, of course, does not raise any issue concerning the applicability of Rule 9 in cases such as this one.

capital case, but there is not a fifth vote to stay the scheduled execution, one of the five Justices who does not believe the case worthy of granting certiorari will nonetheless vote to stay; this is so that the "Rule of Four" will not be rendered meaningless by an execution that occurs before the Court considers the case on the merits.

A "hold" is analogous to a decision to grant a petition for certiorari. The Court's "hold" policy represents the conviction that like cases must be treated alike. Like the "Rule of Four," it grants to a minority of the Court the power to prevent the majority from denying a petition for certiorari when the minority is persuaded that the issues or questions presented in the case to be held are similar to a case that the Court is to decide. The principle is apparent: whether an individual obtains relief should not turn on the fortuity of whether his papers were the first, the second, or the tenth to reach the Court. What counts is the merits. A vote to "hold" is a statement by a number of Justices that the disposition of the granted case may have an effect on the merits of the case which is to be held. The fact that a majority of the Justices disagree with the decision to "hold" does not warrant subversion of the "hold" rule any more than does disagreement by five with the decision to grant a petition for certiorari justify departure from the "Rule of Four." It is unthinkable to me that the practice that four votes to grant certiorari trigger an "automatic" fifth vote to stay an execution should not apply to a "hold" when a man's life is in the balance.

For the Court to deny a stay to a petitioner who is under sentence of death, and whose petition four Justices have determined to hold, is to give a new and gruesome meaning to the old notion of the "race to the courthouse." It is to distinguish as an initial matter between those who may live and those who will die by rewarding with a stay of execution that litigant whose lawyer files his papers first. It is to divide litigants arbitrarily into the condemned and the spared on the basis of what amounts to little more than a footrace. It is to reject those first principles of justice that ultimately define a system of law: the principles of uniform application of rules, of consistency, of evenhandedness, of fairness.

I dissent.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting from denial of application for stay of execution.

The State of Florida intends to execute applicant at 5:01 this afternoon. In the papers he has filed in this Court, applicant claims that the Florida death penalty statute and the cases interpreting it prior to his trial led all participants in his sentencing hearing, including the trial judge, to believe that nonstatutory mitigating circumstances could not be considered in the sentencing decision. He argues that the failure of the trial court to consider such nonstatutory factors violated the injunction of this Court in *Lockett* v. *Ohio*, 438 U. S. 586 (1978), that a death penalty scheme must not prevent the sentencer from considering "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.*, at 604; see *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982).

When presented with evidence that a sentencing judge had actually believed himself precluded from considering nonstatutory mitigating circumstances, both the Florida Supreme Court and the Court of Appeals for the Eleventh Circuit have held that a defendant is constitutionally entitled to a new sentencing proceeding. See, *e. g.*, *Harvard* v. *State*, 486 So. 2d 537 (Fla. 1986); *Songer* v. *Wainwright*, 769 F. 2d 1488 (CA11 1985). Unlike the defendants in *Harvard* and *Songer*, applicant never had the chance during postconviction proceedings to ascertain how his sentencing judge had interpreted Florida's statutory scheme. He now seeks an evidentiary hearing where he might make such an inquiry. I believe he should be given at least the chance to do so.*

I would grant the petition for certiorari and the application for a stay of execution.

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*With respect to JUSTICE POWELL's suggestion that the merits ought not to be reached here, I note only that there is no little confusion on the procedural aspects of this case. When, in his first habeas petition, applicant raised a variant of the *Lockett* claim he raises here, the Court of Appeals incorrectly found that claim procedurally barred even though, on state collateral review, the Florida Supreme Court had reached it on the merits, 422 So. 2d 827, 832 (1982). 772 F. 2d 674, 677–678 (1985). Had the Court of Appeals properly considered that claim, this second habeas petition might not have been necessary.

MAY 21, 1986

Dismissal Under Rule 53

No. 85-6770. ADAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 786 F. 2d 1157.

MAY 27, 1986

Appeals Dismissed

No. 85-31. OWENS ET AL. *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. Appeal from D. C. C. D. Cal. dismissed.

No. 85-1493. METROPOLITAN EDISON CO. ET AL. *v.* PENNSYLVANIA PUBLIC UTILITY COMMISSION ET AL. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. Reported below: 509 Pa. 324, 502 A. 2d 130.

No. 85-1637. BUDGET RENT-A-CAR OF CINCINNATI, INC. *v.* KENTUCKY REVENUE CABINET. Appeal from Sup. Ct. Ky. dismissed for want of substantial federal question. Reported below: 704 S. W. 2d 199.

No. 85-1610. NORTHERN INDIANA PUBLIC SERVICE CO. *v.* CITIZENS ACTION COALITION OF INDIANA, INC., ET AL. Appeal from Sup. Ct. Ind. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 485 N. E. 2d 610.

No. 85-6635. WILKERSON *v.* TOWNSHIP OF EAST BRUNSWICK, NEW JERSEY. Appeal from Super. Ct. N. J., App. Div., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 84-1859. MARSH *v.* BOARD OF EDUCATION OF THE CITY OF FLINT ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Wygant* v. *Jackson Board of Education, ante,* p. 267. Reported below: 762 F. 2d 1009.

No. 85-912. BROCK, SECRETARY OF LABOR *v.* SOUTHEASTERN ARIZONA GOVERNMENTS ORGANIZATION. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Brock* v. *Pierce County, ante,* p. 253.

No. 85–1105. CARTER ET AL. *v.* UNITED STATES;
No. 85–1118. MURRAY *v.* UNITED STATES; and
No. 85–1120. ROONEY *v.* UNITED STATES. C. A. 1st Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *Henderson* v. *United States, ante,* p. 321. JUSTICE STEVENS would deny the petitions for writs of certiorari. Reported below: 771 F. 2d 589.

No. 85–5040. ISAAC *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Henderson* v. *United States, ante,* p. 321. JUSTICE STEVENS would deny the petition for writ of certiorari. Reported below: 762 F. 2d 1000.

Vacated and Remanded After Certiorari Granted

No. 85–236. EICHENLAUB *v.* YURKY ET AL. C. A. 3d Cir. [Certiorari granted, 474 U. S. 1049.] Judgment vacated and case remanded to the Court of Appeals to consider whether the case is moot.

Certiorari Dismissed

No. 85–6947. STRAIGHT *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Petition for writ of certiorari dismissed as moot. Reported below: 791 F. 2d 830.

Miscellaneous Orders

No. — —–—. PEEDE *v.* FLORIDA. Motion to direct the Clerk to file the petition for writ of certiorari without the affidavit in support of motion for leave to proceed *in forma pauperis* granted.

No. D–509. IN RE DISBARMENT OF ALEXANDER. Disbarment entered. [For earlier order herein, see 474 U. S. 977.]

No. D–557. IN RE DISBARMENT OF KEIDEN. It is ordered that Bruce H. Keiden, of Southfield, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 85-88. PAULUSSEN *v.* HERION, 475 U. S. 557. Motion of appellee to retax costs denied. JUSTICE BLACKMUN would grant this motion.

No. 85-495. ANSONIA BOARD OF EDUCATION ET AL. *v.* PHILBROOK ET AL. C. A. 2d Cir. [Certiorari granted, 474 U. S. 1080.] Motion of The Rutherford Institute of Alabama et al. for leave to file a brief as *amici curiae* granted.

No. 85-608. ILLINOIS *v.* KRULL ET AL. Sup. Ct. Ill. [Certiorari granted, 475 U. S. 1080.] Motion of Americans for Effective Law Enforcement, Inc., et al. for leave to file a brief as *amici curiae* granted.

No. 85-1033. KELLY, CONNECTICUT CHIEF STATE'S ATTORNEY, ET AL. *v.* ROBINSON. C. A. 2d Cir. [Certiorari granted, 475 U. S. 1009.] Motion of National Governors' Association et al. for leave to file a brief as *amici curiae* granted.

No. 85-1529. GRUMMAN AEROSPACE CORP. *v.* SHAW. C. A. 11th Cir.; and

No. 85-1623. ISLAMIC REPUBLIC OF IRAN ET AL. *v.* BOEING CO. ET AL. C. A. 9th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 85-6823. IN RE THAPER. Petition for writ of mandamus denied.

Certiorari Granted

No. 85-1208. FALL RIVER DYEING & FINISHING CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 1st Cir. Certiorari granted. Reported below: 775 F. 2d 425.

No. 85-1347. PENNSYLVANIA *v.* RITCHIE. Sup. Ct. Pa. Certiorari granted. Reported below: 509 Pa. 357, 502 A. 2d 148.

No. 85-1384. TURNER ET AL. *v.* SAFLEY ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 777 F. 2d 1307.

No. 85-1589. IOWA MUTUAL INSURANCE CO. *v.* LAPLANTE ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 774 F. 2d 1174.

No. 85-1259. TULL *v.* UNITED STATES. C. A. 4th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 769 F. 2d 182.

No. 85-1613. UNITED STATES *v.* JOHN DOE, INC. I, ET AL. C. A. 2d Cir. Motion of petitioners in No. 85-1840, *Archer-Daniels-Midland Co. et al.* v. *United States*, for contemporaneous consideration denied. Certiorari granted. Reported below: 774 F. 2d 34.

No. 85-5348. BUCHANAN *v.* KENTUCKY. Sup. Ct. Ky. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 691 S. W. 2d 210.

Certiorari Denied. (See also Nos. 85-1610 and 85-6635, *supra.*)

No. 84-6590. ROWAN *v.* OWENS, SUPERINTENDENT, INDIANA STATE REFORMATORY. C. A. 7th Cir. Certiorari denied. Reported below: 752 F. 2d 1186.

No. 84-6854. BECK *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 687 S. W. 2d 155.

No. 84-7000. COLSON *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 507 Pa. 440, 490 A. 2d 811.

No. 85-949. ST. REGIS MOHAWK TRIBE, NEW YORK *v.* BROCK, SECRETARY OF LABOR. C. A. 2d Cir. Certiorari denied. Reported below: 769 F. 2d 37.

No. 85-1109. MILWAUKEE COUNTY, WISCONSIN *v.* BROCK, SECRETARY OF LABOR. C. A. 7th Cir. Certiorari denied. Reported below: 771 F. 2d 983.

No. 85-1167. MAYOR'S OFFICE OF EMPLOYMENT AND TRAINING, CITY OF CHICAGO, ET AL. *v.* UNITED STATES DEPARTMENT OF LABOR. C. A. 7th Cir. Certiorari denied. Reported below: 775 F. 2d 196.

No. 85-1304. SPANG & CO. *v.* DELGROSSO ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 769 F. 2d 928.

No. 85-1319. BUTTS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 777 F. 2d 699.

No. 85-1430. GARTH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 773 F. 2d 1469.

No. 85-1448. LOCAL 560 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 780 F. 2d 267.

No. 85–1463. Marques *v.* United States Department of Health and Human Services. C. A. Fed. Cir. Certiorari denied. Reported below: 776 F. 2d 1062.

No. 85–1545. Baca, Commissioner of Public Lands of the State of New Mexico, et al. *v.* Roe et al. Sup. Ct. N. M. Certiorari denied. Reported below: 103 N. M. 517, 710 P. 2d 84.

No. 85–1569. Dameron *v.* Washington Magazine, Inc., et al. C. A. D. C. Cir. Certiorari denied. Reported below: 250 U. S. App. D. C. 346, 779 F. 2d 736.

No. 85–1599. City of San Diego et al. *v.* Sports Arenas Properties et al. Sup. Ct. Cal. Certiorari denied. Reported below: 40 Cal. 3d 808, 710 P. 2d 338.

No. 85–1611. Arnebergh *v.* E. F. Hutton & Co., Inc. C. A. 9th Cir. Certiorari denied. Reported below: 775 F. 2d 1061.

No. 85–1616. Trans Rent-A-Car, Inc. *v.* Hertz Corp. et al. C. A. 9th Cir. Certiorari denied. Reported below: 766 F. 2d 1292.

No. 85–1618. Slatton *v.* California. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 173 Cal. App. 3d 487, 219 Cal. Rptr. 70.

No. 85–1621. Hon Yip, aka Yip Hon *v.* Pagano. C. A. 3d Cir. Certiorari denied. Reported below: 782 F. 2d 1033.

No. 85–1622. Anderson, fka Jenkins *v.* Minnesota. Sup. Ct. Minn. Certiorari denied. Reported below: 379 N. W. 2d 70.

No. 85–1640. Dineen *v.* Maine Board of Overseers of the Bar. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 500 A. 2d 262.

No. 85–1643. Stroh Container Co. *v.* Delphi Industries, Inc., et al. C. A. 8th Cir. Certiorari denied. Reported below: 783 F. 2d 743.

No. 85–1655. Kaiser Gypsum Co., Inc. *v.* Superior Court of California, County of San Deigo (San Diego Asbestos Litigation Plaintiffs, Real Parties in Interest). Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 85-1687. Home Insurance Co. *v.* Taylor. C. A. 4th Cir. Certiorari denied. Reported below: 777 F. 2d 849.

No. 85-1697. Day *v.* Seabold, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 785 F. 2d 307.

No. 85-1698. Guthrie *v.* International Dairy Queen, Inc., et al. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 3.

No. 85-1720. Vitteck et ux. *v.* Washington Federal Savings & Loan Assn. Super. Ct. Pa. Certiorari denied. Reported below: 348 Pa. Super. 639, 501 A. 2d 296.

No. 85-1738. Ganoe et al. *v.* Neff, Independent Executor of the Estate of Lummis, et al. Ct. App. Tex., 1st Sup. Jud. Dist. Certiorari denied.

No. 85-1739. Hunter *v.* United States. Ct. Mil. App. Certiorari denied. Reported below: 21 M. J. 240.

No. 85-1747. McClain *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 786 F. 2d 1166.

No. 85-1749. Hartsel et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 736 F. 2d 223.

No. 85-1767. Caggiano *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 782 F. 2d 1044.

No. 85-1768. Reale *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 782 F. 2d 179.

No. 85-1785. Carley *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 783 F. 2d 341.

No. 85-6278. Browning *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 779 F. 2d 58.

No. 85-6465. Kimberlin *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 776 F. 2d 1344.

No. 85-6472. Mendoza *v.* Miller, Warden. C. A. 7th Cir. Certiorari denied. Reported below: 779 F. 2d 1287.

No. 85-6481. Frazier *v.* Board of Trustees of Northwest Mississippi Regional Medical Center et al. C. A.

5th Cir. Certiorari denied. Reported below: 765 F. 2d 1278 and 777 F. 2d 329.

No. 85-6623. BROWN *v.* JEFFERSON. C. A. D. C. Cir. Certiorari denied.

No. 85-6634. CONNEL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 85-6636. KOFF *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., Nevada County. Certiorari denied.

No. 85-6639. TORNERO *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 85-6640. VICK *v.* LONG. C. A. 3d Cir. Certiorari denied. Reported below: 774 F. 2d 1153.

No. 85-6641. HALL *v.* ROGERS. C. A. 4th Cir. Certiorari denied. Reported below: 779 F. 2d 45.

No. 85-6644. HOLLAND *v.* BUTTERWORTH, SHERIFF, BROWARD COUNTY, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 85-6647. DAVIDSON *v.* DAVIS, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 783 F. 2d 203.

No. 85-6658. NOVEL *v.* PICARIELLO, JUDGE, ET AL. C. A. 2d Cir. Certiorari denied.

No. 85-6659. MARKS *v.* LEE WAY MOTOR FREIGHT ET AL. C. A. 10th Cir. Certiorari denied.

No. 85-6661. BONVILLAIN *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 780 F. 2d 1248.

No. 85-6662. BECKTEL *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 137 Ill. App. 3d 810, 485 N. E. 2d 474.

No. 85-6663. BOYT *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 109 Ill. 2d 403, 488 N. E. 2d 264.

No. 85-6677. TRAWICK *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 473 So. 2d 1235.

No. 85-6683. HARROD *v.* HALFORD ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 773 F. 2d 234.

No. 85-6712. GIBSON *v.* SCROGGY, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 786 F. 2d 1164.

No. 85-6730. ORTIZ *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 104 Wash. 2d 479, 706 P. 2d 1069.

No. 85-6754. AL-AZZAWY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 784 F. 2d 890.

No. 85-6757. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 85-6759. CORONEL *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied.

No. 85-6763. LAMP *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 779 F. 2d 1088.

No. 85-6765. CARY *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 85-6772. MARKUS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 786 F. 2d 1149.

No. 85-6776. ASSAAD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 784 F. 2d 1111.

No. 85-6780. KELLY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 785 F. 2d 311.

No. 85-6782. CHEIKH *v.* UNITED STATES; and
No. 85-6794. FARRAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 784 F. 2d 1111.

No. 85-6801. BATUOLI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 782 F. 2d 1036.

No. 85-6802. JOHNSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 6.

No. 85-6803. FISHERMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 782 F. 2d 1054.

No. 85-6806. NOLAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 784 F. 2d 496.

No. 85-6813. SCOTT ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 784 F. 2d 787.

No. 85-6822. KORYTO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 787 F. 2d 593.

No. 85-6829. PARADISO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 787 F. 2d 578.

No. 84-6187. KEETEN ET AL. *v.* GARRISON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 742 F. 2d 129.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting as to petitioner Larry Darnell Williams.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 84-6667. MONROE *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 748 F. 2d 958.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

I would grant certiorari in this case to resolve the serious questions it raises concerning the scope of a defendant's rights under *Brady* v. *Maryland*, 373 U. S. 83 (1963), during the period following his conviction. While lower courts here have adhered to our precedents in finding petitioner's *Brady* rights to have been violated, the remedy ordered impermissibly dilutes those rights even as it recognizes them.

I

In 1980, after a previous conviction had been overturned, petitioner was brought to trial in New Orleans, once again charged with the 1978 murder of Lenora Collins, a neighbor. The State's case consisted of eyewitness identifications by the victim's two children, both of whom were present when the assailant broke into their mother's bedroom. *State* v. *Monroe*, 397 So. 2d 1258, 1268 (La. 1981). Accepting the testimony of the two children, who at the time of the murder were aged 12 and 11, the jury rejected petitioner's alibi, found him guilty of first-degree murder, and unanimously recommended the death sentence.

Six months after petitioner's conviction, but while his appeal was still pending, the New Orleans Police Department was contacted by Detective Joseph Gallardo of the Pontiac, Michigan, Police Department. In the course of investigating one George Stinson's murder of his common-law wife in Michigan, Gallardo had received information suggesting that Stinson may also have murdered his previous wife, three years earlier in New Orleans. His previous wife was Lenora Collins, for whose murder petitioner has been sentenced to die. Two months later, Detective Gallardo again called the New Orleans police. This time, he related to Sergeant John McKenzie the substance of an interview he had had with Stinson's cellmate during which the cellmate had quoted Stinson as first confessing to the Michigan murder and then saying that "the same thing happened" to his first wife, Lenora Collins. Noting that a second source had corroborated this admission, Detective Gallardo also reported having received information that Stinson had threatened Lenora Collins' two children into identifying petitioner as their mother's killer.

All this information was carefully recorded by Sergeant McKenzie, who then dispatched his notes to the detectives who had been involved in the Collins investigation. These notes did not trigger further police inquiries. Neither was their existence ever disclosed to petitioner, who under Louisiana law, could have sought the remand of his case so that he might move in the trial court for a new trial. See *State* v. *Spell*, 388 So. 2d 754 (La. 1980). Indeed, it was not until late 1983 that independent investigation by petitioner's counsel led him to Detective Gallardo, who told of Stinson's incriminating admissions and of the fact that the New Orleans police had long before known of the new evidence. Petitioner thereupon filed a motion in New Orleans Criminal District Court seeking a new trial or, in the alternative, postconviction relief, and also a stay of his execution, then scheduled for January 4, 1984. In this motion, petitioner claimed that the State had unconstitutionally suppressed material, exculpatory evidence. While petitioner was still unaware of the existence of Sergeant McKenzie's actual notes, his counsel's independent efforts in Pontiac enabled him to present the Criminal District Court with all of the information contained in the notes.

The day before petitioner's scheduled date of execution, the Criminal District Court denied petitioner's motion without an evidentiary hearing. Weighing the eyewitness testimony of the victim's children against the affidavit of Stinson's cellmate, the court found that the new evidence was not "so material that it ought to produce a different result then *[sic]* the verdict reached." The Louisiana Supreme Court affirmed hours later, *State ex rel Monroe* v. *Maggio*, 444 So. 2d 606 (1984), although two justices would have granted a stay and ordered a "full evidentiary hearing on the newly discovered evidence issue." The two noted: "Because the death penalty is so final, surely no harm would come from continuing this matter one month to allow the defense to produce witnesses from Michigan, and having the trial court evaluate this evidence." *Ibid.*

After the state court denied relief, the Federal District Court acted upon a habeas petition filed several days earlier, and stayed petitioner's execution. After a hearing in which he heard testimony from Detective Gallardo and Stinson, a Magistrate held that the information allowed to sit undisturbed in New Orleans police files was both improperly suppressed and clearly favorable to petitioner. He recommended that the writ be granted.

The District Court adopted the Magistrate's report, agreeing that the information received from Detective Gallardo was material, exculpatory information that under *United States* v. *Agurs*, 427 U. S. 97 (1976), should have been disclosed to petitioner. The District Court noted that, when coupled with the absence of physical evidence linking petitioner to the murder, the possibility that the eyewitness testimony of the victim's children may have been coerced, and testimony by petitioner's mother placing Stinson at the victim's house on the day of the murder, the suppressed evidence "makes the assertion that Stinson committed the murder plausible." Finding the evidence to "creat[e] a reasonable doubt as to Monroe's guilt that did not previously exist," the court issued the writ. However, having concluded that petitioner's due process rights under *Brady* had been violated, the court did not order that he be released or retried. Rather, it ordered Louisiana

> "to grant to Petitioner whatever he was entitled to by way of post-conviction relief during the limitation period provided by Louisiana law for a request for a new trial based on the excul-

> patory material which the State courts did not have an opportunity to consider, so that Petitioner may fully and effectively exercise and exhaust his post-conviction rights under Louisiana law."

The Court of Appeals upheld the District Court's choice of remedy. 748 F. 2d 958, 960 (CA5 1984).

II

In *Brady* v. *Maryland*, 373 U. S. 83 (1963), this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.*, at 87. In *United States* v. *Agurs*, *supra*, we recognized that

> "there are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request. For though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest that 'justice shall be done.'" *Id.*, at 110–111 (footnote omitted).

The message of *Brady* and its progeny is that a trial is not a mere "sporting event"; it is a quest for truth in which the prosecutor, by virtue of his office, must seek truth even as he seeks victory. See *United States* v. *Bagley*, 473 U. S. 667, 675 (1985) (*Brady* rule to "ensure that a miscarriage of justice does not occur").

The quest for truth may not terminate with a defendant's conviction. In Louisiana, a convicted defendant must receive a new trial whenever

> "[n]ew and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty." La. Code Crim. Proc. Ann., Art. 851(3) (West 1984).

When the sovereign has decided that justice will be best served by qualifying the finality of a conviction so that a convicted defendant may yet prove his innocence, its attorney is not free to choose otherwise. And until factfinding proceedings, or the possibility of them, is terminated, the State remains bound by the rules of simple fairness that *Brady* held to be of constitutional dimension. It would hardly make sense to hold the State to a special duty to disclose exculpatory evidence in any adversarial proceeding and then permit the State to avoid this obligation by suppressing the very evidence that would enable a defendant to trigger such proceedings.[1]

In this case there can be no doubt that petitioner's due process rights were violated by the State's failure to disclose to him the information that Detective Gallardo related to the New Orleans police. That the information lay undisturbed in the files of the police and not those of the prosecutor should make no difference. The police files that so readily provided the State with the incriminating material to convict a defendant cannot be turned into a dead-letter repository where evidence of innocence is concerned. See *Moore* v. *Illinois*, 408 U. S. 786, 810 (1972) (MARSHALL, J., concurring in part and dissenting in part); *Smith* v. *Florida*, 410 F. 2d 1349, 1351 (CA5 1969). If by now police are not fully aware of their constitutional obligation to disclose exculpatory evidence even in the absence of a specific request by the prosecutor or defense counsel, this Court should seize this case as a chance to educate them.

This is certainly not a case in which the failure, whether intentional or inadvertent, of the police to alert petitioner to the new information can be attributed to their failure to understand the complexities of the *Brady* rule. At the time the evidence was suppressed, *Agurs* obliged the State to disclose evidence that created "a reasonable doubt that did not otherwise exist" as to defendant's guilt. 427 U. S., at 112. And though the District Court here quite properly made a careful examination of the transcripts from petitioner's second trial before holding the information from Detective Gallardo to be "material" under the *Agurs* standard,[2] I cannot believe that either an examination of the record or a law degree is needed to appreciate that admissions by a wife-killer incriminating himself in the murder of a former wife cannot be dismissed as idle gossip.

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[1] Because in this case, the State suppressed exculpatory evidence while petitioner could still have sought postconviction relief under state law, we need not consider whether the State also deprived petitioner of a federal right to seek habeas relief on the basis of evidence that undermines the sufficiency of the evidence supporting his conviction. See *Dobbert* v. *Wainwright*, 468 U. S. 1231, 1234 (1984) (BRENNAN, J., dissenting from denial of stay and certiorari); Wright & Sofaer, Federal Habeas Corpus for State Prisoners, 75 Yale L. J. 895, 958, n. 223 (1966).

III

While it was correct to find a *Brady* violation, the District Court appears to have believed that because the Louisiana courts were not given an opportunity to consider the evidence that petitioner was able to develop in the course of his federal habeas proceeding—to wit, Sergeant McKenzie's actual notes of his conversations with Detective Gallardo and the testimony of Detective Gallardo at the habeas hearing—they should now be allowed to decide whether they were a bit hasty in denying petitioner's new trial motion on the eve of his execution. However, the only reason why the state courts never considered this evidence was that they dismissed petitioner's motion without an evidentiary hearing. It was only after the Federal District Court gave petitioner the chance to subpoena the evidence that it came to light. Moreover, as the Court of Appeals observed, the state courts were presented with the "same underlying information" as that contained in Sergeant McKenzie's notes. Having adequately asserted in state courts the basis for his *Brady* claim, petitioner plainly satisfied the exhaustion requirement of federal habeas corpus.

Sending petitioner back to state court with his already exhausted claim is particularly inappropriate here because of the nature of the constitutional violation. If the police had not improperly suppressed the exculpatory information, petitioner would have been able to seek a new trial under Art. 851(3). To require petitioner now to pursue this same remedy is thus to treat the suppressed information just as if it had been "found in a neutral source" and therefore to ignore the "special significance" of the police's obligation to serve the cause of justice. *United States* v. *Agurs*, 427 U. S., at 111. The remedy ordered here removes from the State any incentive to make timely disclosure of material, exculpatory evidence and trivializes the constitutional right recognized in *Brady* and its progeny. The only way this right can be guaranteed is to grant petitioner the remedy that until now has always followed a determination that the *Brady* rule has been violated: He must be released or retried. Because I do not believe this Court should stand by in the face of the dilution of the due process rights of an individual who may not even be guilty of the crime for which he stands under death sentence, I respectfully dissent from the denial of certiorari.

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[2] It is clear that this evidence would also be material under the standard established by this Court in *United States* v. *Bagley*, 473 U. S. 667 (1985).

No. 85–1262. TEXAS ASSOCIATION OF CONCERNED TAXPAYERS, INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 772 F. 2d 163.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

Petitioner Texas Association of Concerned Taxpayers challenges the Tax Equity and Fiscal Responsibility Act of 1982, 96 Stat. 324 (TEFRA), on the ground that it was enacted in violation of the Origination Clause of the United States Constitution, which provides that "[a]ll Bills for raising Revenue shall originate in the House of Representatives." Art. I, § 7, cl. 1. Specifically, petitioner asserts that when the bill originated in the House of Representatives, it was not a "bill for raising revenue" within the meaning of the Origination Clause because the net effect of the bill would have been to reduce the amount of revenue collected.

The United States Court of Appeals for the Fifth Circuit held that this issue was a nonjusticiable political question. 772 F. 2d 163, 165–167 (1985). This holding conflicts with the Ninth Circuit's explicit holding with respect to an identical challenge to TEFRA that the Origination Clause issue was in fact justiciable. See *Armstrong* v. *United States*, 759 F. 2d 1378, 1381–1382 (1985). See also *Wardell* v. *United States*, 757 F. 2d 203 (CA8 1985) *(per curiam)* (adjudicating same claim on the merits); *Heitman* v. *United States*, 753 F. 2d 33 (CA6 1984) *(per curiam)* (same). The Fifth Circuit's holding is also in tension with this Court's decision in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 142–143 (1911), in which we also adjudicated an Origination Clause challenge to a statute. To resolve this conflict among the Circuits, I would grant certiorari.

No. 85-1321. RAMIREZ *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 39 Cal. 3d 931, 705 P. 2d 897.

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE POWELL join, dissenting.

Petitioner Rudy Ramirez is currently serving a prison term imposed by the State of California for a crime committed before January 1, 1983. As of that date, a new plan for awarding sentence reduction credits and their forfeiture became effective. See Cal. Penal Code Ann. §§2931, 2932 (West Supp. 1986). Ramirez was charged in January 1983 with altering the paperwork relating to a television set. This resulted in a loss under the new plan of 95 days of behavior credits, which was later reduced to 48 days. Under the old plan, Ramirez would have forfeited at most 15 days.

Ramirez then filed a habeas corpus petition in the California state courts, challenging the application to him of the new system on the ground that such application violated the *Ex Post Facto* Clause of the United States Constitution. Art. I, §10. A divided California Supreme Court upheld the new system, as applied to Ramirez, applying the two-part test set forth in *Weaver* v. *Graham*, 450 U. S. 24, 29 (1981), and concluding that the new provisions were not unconstitutionally retrospective because the increased sanctions were imposed only for misconduct occurring after the changes became effective. *In re Ramirez*, 39 Cal. 3d 931, 705 P. 2d 897 (1985).

The decision of the California Supreme Court conflicts with the decision of the United States Court of Appeals for the Fifth Circuit in *Beebe* v. *Phelps*, 650 F. 2d 774 (1981). In *Beebe*, the Fifth Circuit held that the application of new provisions for revoking previously earned credits for parole violations to a prisoner who had been incarcerated before the new provisions became effective violated the *Ex Post Facto* Clause even where the parole violations occurred after the effective date of the new provisions. The decision of the California Supreme Court also is in tension with our decision in *Weaver*, *supra*, in which we held that the application to a prisoner of a new system for earning good-time credits, which system reduced the credits that could be earned, violated the *Ex Post Facto* Clause. See also *Greenfield* v. *Scafati*, 277 F. Supp. 644 (Mass. 1967), summarily aff'd, 390 U. S. 713 (1968). In *Weaver*, we analyzed the question of retrospectivity according to whether the new rule "substantially alters the consequences attached to a crime already completed," 450 U. S., at 33, and the California Supreme Court's distinction here between the ability to earn good-time credits, at issue in *Weaver*, and the forfeiture of such credits, at issue here, does not seem immediately relevant to this analysis. To resolve the conflict with *Beebe* and the tension with *Greenfield* and *Weaver*, I would grant certiorari and set the case for argument.

No. 85-1646. KEMP, WARDEN *v.* WILSON. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 777 F. 2d 621.

No. 85-1752. KAIRYS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 782 F. 2d 1374.

No. 85-5022. RUSHING *v.* LOUISIANA. Sup. Ct. La.;
No. 85-5082. WATSON *v.* BLACKBURN, WARDEN. C. A. 5th Cir.;
No. 85-6308. LOWENFIELD *v.* LOUISIANA. Sup. Ct. La.;
No. 85-6551. BROCK *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir.;
No. 85-6584. KORDENBROCK *v.* KENTUCKY. Sup. Ct. Ky.;
No. 85-6643. BEAM *v.* IDAHO. Sup. Ct. Idaho;
No. 85-6665. BARNES *v.* TENNESSEE. Sup. Ct. Tenn.;
No. 85-6668. HARBISON *v.* TENNESSEE. Sup. Ct. Tenn.; and
No. 85-6675. BYRD *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 85-5022, 464 So. 2d 268; No. 85-5082, 756 F. 2d 1055; No. 85-6308, 495 So. 2d 1245; No. 85-6551, 781 F. 2d 1152; No. 85-6584, 700 S. W. 2d 384; No. 85-6643, 109 Idaho 616, 710 P. 2d 526; No. 85-6665, 703 S. W. 2d 611; No. 85-6668, 704 S. W. 2d 314; No. 85-6675, 481 So. 2d 468.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 85-301. AMEY, INC., ET AL. *v.* GULF ABSTRACT & TITLE, INC., ET AL., 475 U. S. 1107. Petition for rehearing denied.

No. 85-6432. JACKSON *v.* NEWSOME, WARDEN, 475 U. S. 1126. Petition for rehearing denied.

No. 85-531. CITY OF LOS ANGELES ET AL. *v.* HELLER, 475 U. S. 796. Petition for rehearing denied. JUSTICE BRENNAN took no part in the consideration or decision of this petition.

JUNE 2, 1986

Appeals Dismissed

No. 85-1344. TAYLOR *v.* MOONEY, SUPERINTENDENT, WEST VIRGINIA DEPARTMENT OF PUBLIC SAFETY, ET AL. Appeal from Cir. Ct. W. Va., Kanawha County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85-1823. STROOM *v.* CARTER, FORMER PRESIDENT OF THE UNITED STATES, ET AL. Appeal from C. A. 3d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 787 F. 2d 584.

No. 85-6669. KEANE *v.* AMBACH. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 788 F. 2d 5.

No. 85-6670. D'AREZZO *v.* ESTATE OF CHRISTY ET AL. Appeal from Sup. Ct. R. I. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 499 A. 2d 744.

No. 85-6709. ARNOLD *v.* SOUTH DAKOTA. Appeal from Sup. Ct. S. D. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 379 N. W. 2d 322.

No. 85-1714. PAYNE ET UX. *v.* MOUNT, SHERIFF OF WHATCOM COUNTY, WASHINGTON, ET AL. Appeal from Ct. App. Wash. dismissed for want of jurisdiction. Reported below: 41 Wash. App. 627, 705 P. 2d 297.

No. 85-6521. CAMPBELL *v.* GRIFFIN, DISTRICT JUDGE, FIRST JUDICIAL DISTRICT COURT OF NEVADA, CARSON CITY. Appeal from Sup. Ct. Nev. dismissed for want of substantial federal question. Reported below: 101 Nev. 718, 710 P. 2d 70.

No. 85-6687. ACEN ET AL. *v.* MASSACHUSETTS. Appeal from Sup. Jud. Ct. Mass. dismissed for want of substantial federal question. Reported below: 396 Mass. 472, 487 N. E. 2d 189.

Miscellaneous Orders

No. — — ——. MANRIQUE-FERNANDEZ *v.* IMMIGRATION AND NATURALIZATION SERVICE. Motion to direct the Clerk to file the petition for writ of certiorari out of time denied.

No. — — ——. GRACE *v.* HEARTLAND TRANSPORTATION INC., 475 U. S. 1042. Motion for reconsideration of order of Court entered March 3, 1986, denied.

No. D-546. IN RE DISBARMENT OF AUGUST. Irving A. August, of Birmingham, Mich., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on February 24, 1986 [475 U. S. 1004], is hereby discharged.

No. D-549. IN RE DISBARMENT OF DUKE. Charles Louis Duke, of Houston, Tex., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on March 24, 1986 [475 U. S. 1079], is hereby discharged.

No. D-552. IN RE DISBARMENT OF PLAZA. Disbarment entered. [For earlier order herein, see 475 U. S. 1106.]

No. 84-2022. 324 LIQUOR CORP., DBA YORKSHIRE WINE & SPIRITS *v.* MCLAUGHLIN ET AL. Ct. App. N. Y. [Probable jurisdiction noted, 475 U. S. 1080.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85-495. ANSONIA BOARD OF EDUCATION ET AL. *v.* PHILBROOK ET AL. C. A. 2d Cir. [Certiorari granted, 474 U. S. 1080.] Motion of respondents Ansonia Federation of Teachers et al. for divided argument granted.

No. 85-971. CLARKE, COMPTROLLER OF THE CURRENCY *v.* SECURITIES INDUSTRY ASSN.; and

No. 85-972. SECURITY PACIFIC NATIONAL BANK *v.* SECURITIES INDUSTRY ASSN. C. A. D. C. Cir. [Certiorari granted, 475 U. S. 1044.] Motion of Legal Foundation of America for leave to file a brief as *amicus curiae* granted. Motion of the

Solicitor General to dispense with printing the joint appendix granted.

No. 85–1027. ARIZONA *v.* HICKS. Ct. App. Ariz. [Certiorari granted, 475 U. S. 1107.] Motion of Americans for Effective Law Enforcement, Inc., et al. for leave to file a brief as *amici curiae* granted.

No. 85–1233. INTERNATIONAL PAPER CO. *v.* OUELLETTE ET AL. C. A. 2d Cir. [Certiorari granted, 475 U. S. 1081.] Motion of Mid-America Legal Foundation for leave to file a brief as *amicus curiae* granted.

No. 85–1388. ROSE *v.* ARKANSAS STATE POLICE. Ct. App. Ark. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 85–6698. CAPPIELLO *v.* CAPPIELLO. Ct. App. N. Y.;

No. 85–6768. RAMIREZ *v.* UNITED STATES. Ct. Mil. App.; and

No. 85–6769. MCNEAIR *v.* GEORGETOWN UNIVERSITY HOSPITAL. C. A. D. C. Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until June 23, 1986, within which to pay the docketing fee required by Rule 45(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petitions for writs of certiorari without reaching the merits of the motions to proceed *in forma pauperis*.

No. 85–5957. IN RE SHEWCHUN. Petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 85–1658. FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* FLORIDA POWER CORP. ET AL.; and

No. 85–1660. GROUP W CABLE, INC., ET AL. *v.* FLORIDA POWER CORP. ET AL. Appeals from C. A. 11th Cir. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 772 F. 2d 1537.

Certiorari Granted

No. 85–1736. JERSEY SHORE STATE BANK *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted. Reported below: 781 F. 2d 974.

No. 85–184. STRINGFELLOW ET AL. *v.* CONCERNED NEIGHBORS IN ACTION ET AL. C. A. 9th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 755 F. 2d 1383 and 783 F. 2d 821.

No. 85–1222. INTERSTATE COMMERCE COMMISSION *v.* TEXAS ET AL.; and

No. 85–1267. MISSOURI-KANSAS-TEXAS RAILROAD CO. ET AL. *v.* TEXAS ET AL. C. A. 5th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 770 F. 2d 452.

No. 85–1239. AMOCO PRODUCTION CO. ET AL. *v.* VILLAGE OF GAMBELL ET AL.; and

No. 85–1406. HODEL, SECRETARY OF THE INTERIOR, ET AL. *v.* VILLAGE OF GAMBELL ET AL. C. A. 9th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 774 F. 2d 1414.

No. 85–1563. CALIFORNIA *v.* BROWN. Sup. Ct. Cal. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 40 Cal. 3d 512, 709 P. 2d 440.

No. 85–5221. GRIFFITH *v.* KENTUCKY. Sup. Ct. Ky. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari is granted limited to the following question: "In cases pending on direct appeal, should the holding in *Batson* v. *Kentucky*, *ante*, p. 79, be given retroactive effect?" Case is set for oral argument in tandem with No. 85–5731, *Brown* v. *United States*, immediately *infra*.

No. 85–5731. BROWN *v.* UNITED STATES. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari is granted limited to the following question: "In cases pending on direct appeal, should the holding in *Batson* v. *Kentucky*, *ante*, p. 79, be given retroactive effect?" Case is set for oral argument in tandem with No. 85–5221, *Griffith* v. *Kentucky*, immediately *supra*. Reported below: 770 F. 2d 912.

Certiorari Denied. (See also Nos. 85–1344, 85–1823, 85–6669, 85–6670, and 85–6709, *supra*.)

No. 85–112. LITTLE CROW MILLING CO., INC., ET AL. *v.* BALTIMORE & OHIO RAILROAD ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 759 F. 2d 1305.

No. 85–1229. RUSSELL ET AL. *v.* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 771 F. 2d 493.

No. 85–1279. UNITED NUCLEAR CORP. ET AL. *v.* THOMAS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL. (two cases);
No. 85–1280. AMERICAN MINING CONGRESS *v.* THOMAS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL. (two cases); and
No. 85–6404. KEPFORD *v.* THOMAS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: Nos. 85–1279 and 85–1280 (first cases), 772 F. 2d 617; Nos. 85–1279 and 85–1280 (second cases) and No. 85–6404, 772 F. 2d 640.

No. 85–1291. LEVINE ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (UNITED STATES, REAL PARTY IN INTEREST). C. A. 9th Cir. Certiorari denied. Reported below: 764 F. 2d 590 and 775 F. 2d 1054.

No. 85–1339. COHEN ET AL. *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. Reported below: 103 N. M. 558, 711 P. 2d 3.

No. 85–1386. HOLLOWAY *v.* UNITED STATES; and
No. 85–1391. SULLIVAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 778 F. 2d 653.

No. 85–1410. MALONE & HYDE, INC. *v.* TANDY CORP. C. A. 6th Cir. Certiorari denied. Reported below: 769 F. 2d 362 and 777 F. 2d 1130.

No. 85–1431. BOLTON ET AL., DBA PRYOR & GLEN COAL CO. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 781 F. 2d 528.

No. 85–1486. LOCAL 32, INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION *v.* PACIFIC MARITIME ASSN. ET AL.

C. A. 9th Cir. Certiorari denied. Reported below: 773 F. 2d 1012.

No. 85-1505. TURNBULL CONE BAKING COMPANY OF TENNESSEE *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 778 F. 2d 292.

No. 85-1538. KATZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 778 F. 2d 963.

No. 85-1541. BATTAGLIA ET AL. *v.* BERGER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 779 F. 2d 992.

No. 85-1555. ROSE *v.* TOWN OF HARWICH. C. A. 1st Cir. Certiorari denied. Reported below: 778 F. 2d 77.

No. 85-1642. CUNNINGHAM *v.* SAFEWAY TRAILS, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 795 F. 2d 78.

No. 85-1661. COONEY *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 136 Ill. App. 3d 989, 484 N. E. 2d 802.

No. 85-1662. WALKER *v.* TIME LIFE FILMS, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 784 F. 2d 44.

No. 85-1669. FINDLAY *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 198 Conn. 328, 502 A. 2d 921.

No. 85-1670. CAMPBELL, TRUSTEE *v.* WELLS FARGO BANK, N. A., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 781 F. 2d 440.

No. 85-1671. AQUAMARINE OPERATORS, INC. *v.* DOWNER. Sup. Ct. Tex. Certiorari denied. Reported below: 701 S. W. 2d 238.

No. 85-1677. JOHNSON *v.* ALABAMA AGRICULTURAL AND MECHANICAL UNIVERSITY ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 481 So. 2d 336.

No. 85-1679. DALEY *v.* FRANK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 776 F. 2d 834.

No. 85-1680. E. B. *v.* BURLINGTON COUNTY WELFARE AGENCY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 85-1711. GRIMES *v.* LOUISVILLE & NASHVILLE RAILROAD Co. C. A. 7th Cir. Certiorari denied. Reported below: 767 F. 2d 925.

No. 85-1724. UNDERWOOD *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 484 So. 2d 520.

No. 85-1725. KENNEDY *v.* GENERAL SERVICES ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 785 F. 2d 326.

No. 85-1729. MEADS ET AL. *v.* FLYING TIGER LINE, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 758 F. 2d 661.

No. 85-1756. POOL *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 483 So. 2d 331.

No. 85-1758. TURNER *v.* PARSONS. C. A. 3d Cir. Certiorari denied. Reported below: 787 F. 2d 584.

No. 85-1783. ARDITO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 782 F. 2d 358.

No. 85-1784. BONANSINGA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 773 F. 2d 166.

No. 85-1787. WISNIEWSKI *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 21 M. J. 370.

No. 85-1795. HOFFMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 784 F. 2d 798.

No. 85-1800. FREEMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 786 F. 2d 1164.

No. 85-1810. SCHREIBER, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROSS *v.* CHASE FEDERAL SAVINGS & LOAN ASSN. Sup. Ct. Fla. Certiorari denied. Reported below: 479 So. 2d 90.

No. 85-1833. STANGER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 6.

No. 85-5990. MONTGOMERY *v.* SEITER ET AL. C. A. 6th Cir. Certiorari denied.

No. 85-6330. FUENTES-JIMENEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 750 F. 2d 1495.

No. 85-6356. BUTLER *v.* JOHNSON ET AL. C. A. 11th Cir. Certiorari denied.

No. 85-6498. CARDINAL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 782 F. 2d 34.

No. 85-6510. JENKINS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 780 F. 2d 472.

No. 85-6518. GLOVER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 66 N. Y. 2d 931, 489 N. E. 2d 765.

No. 85-6538. HALL *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 85-6672. COLEMAN *v.* ABACUS CORP. ET AL. Sup. Ct. Del. Certiorari denied. Reported below: 508 A. 2d 72.

No. 85-6673. FRONEBERGER *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 786 F. 2d 1153.

No. 85-6681. HURTADO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 85-6682. PARKHURST *v.* QUARLES, WARDEN, ET AL. Ct. App. Mich. Certiorari denied.

No. 85-6684. RANDALL *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 85-6689. NABOZNY *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 781 F. 2d 83.

No. 85-6697. LOFTON *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 85-6700. ROSBERG *v.* COMMERCIAL STATE BANK OF WAUSA, NEBRASKA. Sup. Ct. Neb. Certiorari denied.

No. 85-6703. WALKER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 725 F. 2d 693.

No. 85-6706. DAY *v.* UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ET AL. C. A. 5th Cir. Certiorari before judgment denied.

No. 85-6741. STRATTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 820.

No. 85-6743. LIPSMAN *v.* ANDERSON ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 800 F. 2d 1128.

No. 85-6747. COCHRAN *v.* UNITED STATES POSTAL SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 783 F. 2d 1061.

No. 85-6751. THERRIEN *v.* VOSE, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION. C. A. 1st Cir. Certiorari denied. Reported below: 782 F. 2d 1.

No. 85-6766. LARKIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 780 F. 2d 1031.

No. 85-6785. MAYBERRY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 784 F. 2d 402.

No. 85-6792. CORLEY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 85-6799. SPANO, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF SPANO *v.* ONONDAGA COUNTY, NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 35.

No. 85-6807. SAUERS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 771 F. 2d 64.

No. 85-6812. DAVIDSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 85-6827. ANDERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 785 F. 2d 1036.

No. 85-6838. WALETZKI *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 786 F. 2d 1168.

No. 85-6841. ORGERA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 786 F. 2d 1148.

No. 85-6858. GARZA-PACHECO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 784 F. 2d 1112.

No. 85-6860. BUTLER ET AL. *v.* BROOKLYN UNION GAS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 6.

No. 85–6861. HYDE *v.* PITTMAN, ATTORNEY GENERAL OF MISSISSIPPI, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 788 F. 2d 759.

No. 85–6865. FRITTS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 85–1349. INTAKE WATER CO. *v.* YELLOWSTONE RIVER COMPACT COMMISSION ET AL. C. A. 9th Cir. Motion of Yellowstone Pipeline Co. Inc. et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 769 F. 2d 568.

No. 85–1439. FRANKLIN AND MARSHALL COLLEGE *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 3d Cir. Certiorari denied. Reported below: 775 F. 2d 110.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

The Equal Employment Opportunity Commission is investigating petitioner on a charge of discriminating on the basis of national origin in denying tenure to a former assistant professor. In the course of its investigation, the EEOC issued a subpoena *duces tecum* for evaluations submitted by petitioner's faculty in all cases in which tenure was granted or denied from 1977 to the present. The EEOC offered to accept the subpoenaed materials with names and identifying characteristics deleted. Petitioner resisted the subpoena, asserting a privilege against the compelled production of confidential peer review materials absent a showing of facts supporting an inference of discrimination. The United States Court of Appeals for the Third Circuit rejected the asserted privilege, 775 F. 2d 110 (1985), which has been accepted by another Court of Appeals, see *EEOC* v. *University of Notre Dame du Lac*, 715 F. 2d 331, 337, n. 4 (CA7 1983). I would grant certiorari to resolve this conflict.

No. 85–1631. RANDOLPH *v.* SUPREME COURT OF NEW JERSEY ET AL. Sup. Ct. N. J. Certiorari denied. JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE BLACKMUN would grant certiorari. Reported below: 101 N. J. 425, 502 A. 2d 533.

No. 85–1649. MIDWEST COMMUNICATIONS, INC. *v.* MINNESOTA TWINS, INC., ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 779 F. 2d 444.

No. 85-1652. KEMP, WARDEN *v.* COLEMAN; and KEMP, WARDEN *v.* ISAACS ET AL. C. A. 11th Cir. Motions of respondents Coleman, Dungee, and Isaacs for leave to proceed *in forma pauperis* granted. Certiorari denied. THE CHIEF JUSTICE would grant certiorari. Reported below: 778 F. 2d 1487 (first case); 778 F. 2d 1482 (second case).

No. 85-1673. MILLER *v.* SOUTH CAROLINA. Ct. Gen. Sess. S. C., Horry County. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari.

No. 85-5394. JENKINS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 763 F. 2d 1390.

No. 85-5446. BERRY *v.* KING, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 765 F. 2d 451.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

This is yet another capital case in which defense counsel failed to present *any* mitigation evidence whatsoever during the sentencing phase of a defendant's trial. I believe that, except perhaps in the extraordinary case, counsel's failure even to attempt to give the jury some reason for believing a defendant is not deserving of death denies defendant his Sixth Amendment right to the effective assistance of counsel. And I have yet to see that extraordinary case. I would grant the petition for certiorari and vacate the sentence.

No. 85-5466. CELESTINE *v.* BLACKBURN, WARDEN. C. A. 5th Cir.;
No. 85-5491. HOUSTON *v.* TENNESSEE. Sup. Ct. Tenn.;
No. 85-5564. CABELLO *v.* MISSISSIPPI. Sup. Ct. Miss.;
No. 85-5607. BOWDEN *v.* KEMP, WARDEN. C. A. 11th Cir.;
No. 85-5640. LILES *v.* OKLAHOMA. Ct. Crim. App. Okla.;

No. 85–5736. McDowell *v.* North Carolina. Super. Ct. N. C., Lee County;

No. 85–5852. Malone *v.* Missouri. Sup. Ct. Mo.;

No. 85–6676. Neal *v.* Illinois. Sup. Ct. Ill.; and

No. 85–6692. Brown *v.* North Carolina. Sup. Ct. N. C. Certiorari denied. Reported below: No. 85–5564, 471 So. 2d 332; No. 85–5607, 774 F. 2d 1494; No. 85–5640, 702 P. 2d 1025; No. 85–5852, 694 S. W. 2d 723; No. 85–6676, 111 Ill. 2d 180, 489 N. E. 2d 845; No. 85–6692, 315 N. C. 40, 337 S. E. 2d 808.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 85–1343. Humphrey et al., dba Humphrey & Haas *v.* Committee on Professional Ethics and Conduct of the Iowa State Bar Assn., 475 U. S. 1114;

No. 85–6501. Robinson *v.* United States, 475 U. S. 1134; and

No. 85–6579. Volino *v.* United States, 475 U. S. 1128. Petitions for rehearing denied.

No. 85–6052. Augustyniak *v.* City of New York et al., 475 U. S. 1027. Motion for leave to file petition for rehearing denied.

June 8, 1986

Miscellaneous Order

No. A–950. Esquivel *v.* McCotter, Director, Texas Department of Corrections. Application for stay of execution of sentence of death, presented to Justice White, and by him referred to the Court, denied.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay in order to give the applicant time to file a petition for writ of certiorari, and would grant the petition and vacate the death sentence in this case.

JUNE 9, 1986

Appeals Dismissed

No. 84–623. CINCINNATI BELL TELEPHONE CO. *v.* PUBLIC UTILITIES COMMISSION OF OHIO ET AL. Appeal from Sup. Ct. Ohio. Motion of GTE Service Corp. for leave to file a brief as *amicus curiae* granted. Appeal dismissed for want of substantial federal question. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this motion and this case. Reported below: 12 Ohio St. 3d 280, 466 N. E. 2d 848.

No. 84–870. LOUISIANA PUBLIC SERVICE COMMISSION ET AL. *v.* SOUTH CENTRAL BELL TELEPHONE CO. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari granted. Judgment vacated and case remanded for further consideration in light of *Public Service Comm'n* v. *Chesapeake & Potomac Tel. Co.*, *ante*, p. 445. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 744 F. 2d 1107.

No. 85–132. HEMME ET AL. *v.* UNITED STATES ET AL. Appeal from D. C. S. D. Ill. dismissed for want of jurisdiction.

No. 85–1644. BRIEHLER *v.* POSEIDON VENTURE, INC., ET AL. Appeal from Sup. Ct. R. I. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 502 A. 2d 821.

No. 85–6727. VALWAY ET AL. *v.* BURLINGAME. Appeal from Sup. Ct. N. H. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85–1689. GINOCCHI *v.* BURRELL SCHOOL DISTRICT. Appeal from Pa. Commw. Ct. dismissed for want of substantial federal question.

No. 85–6742. JOHNSTON *v.* PERROTT. Appeal from Sup. Ct. Vt. dismissed for want of a properly presented federal question.

Certiorari Granted—Vacated and Remanded. (See also No. 84–870, *supra.*)

No. 84–483. ARKANSAS PUBLIC SERVICE COMMISSION ET AL. *v.* SOUTHWESTERN BELL TELEPHONE CO. C. A. 8th Cir. Motion of National Association of Regulatory Utility Commissioners et al. for leave to file a brief as *amici curiae* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Public Service Comm'n* v. *Chesapeake & Potomac Tel. Co., ante,* p. 445. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this motion and this case. Reported below: 738 F. 2d 901.

No. 85–55. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* POLASKI ET AL. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bowen* v. *City of New York, ante,* p. 467. Reported below: 751 F. 2d 943.

No. 85–474. HYATT ET AL. *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bowen* v. *City of New York, ante,* p. 467. Reported below: 757 F. 2d 1455.

No. 85–6553. GIBSON ET AL. *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Motion of petitioner Norman Bonds for leave to proceed *in forma pauperis* granted. The petition for writ of certiorari as to Norman Bonds is granted, the judgment is vacated, and the case is remanded for further consideration in light of *Lee* v. *Illinois, ante,* p. 530. The petition for writ of certiorari as to Sammy Gibson is denied. Reported below: 137 Ill. App. 3d 330, 484 N. E. 2d 858.

Miscellaneous Orders

No. A–901. CARTER ET AL. *v.* FARM BUREAU SERVICES, INC. C. A. 6th Cir. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–907. HOFFART *v.* TEXAS. Ct. App. Tex., 14th Sup. Jud. Dist. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A–919. MILLER *v.* IDAHO. Sup. Ct. Idaho. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D-542. IN RE DISBARMENT OF BOWLES. Disbarment entered. [For earlier order herein, see 474 U. S. 1079.]

No. D-548. IN RE DISBARMENT OF MARBLE. Disbarment entered. [For earlier order herein, see 475 U. S. 1079.]

No. 85-99. MESSERSCHMITT BOLKOW BLOHM, GMBH. *v.* WALKER ET AL. C. A. 5th Cir. The order entered April 21, 1986, granting the petition for writ of certiorari is vacated.

No. 85-6836. GUTIERREZ *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 30, 1986, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

Probable Jurisdiction Postponed

No. 85-1708. CALIFORNIA ET AL. *v.* CABAZON BAND OF MISSION INDIANS ET AL. Appeal from C. A. 9th Cir. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 783 F. 2d 900.

Certiorari Granted

No. 85-1695. SOCIÉTÉ NATIONALE INDUSTRIELLE AÉROSPATIALE ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA. C. A. 8th Cir. Certiorari granted. Reported below: 782 F. 2d 120.

No. 85-1433. RICHARDSON, WARDEN *v.* MARSH. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 781 F. 2d 1201.

No. 85-5939. CRUZ *v.* NEW YORK. Ct. App. N. Y. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 66 N. Y. 2d 61, 485 N. E. 2d 221.

No. 85-6756. HITCHCOCK *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Questions I, II, and IV presented by the petition. Reported below: 770 F. 2d 1514.

Certiorari Denied. (See also Nos. 85–1644, 85–6727, and 85–6553, *supra.*)

No. 85–239. HOFFMAN ET AL. *v.* SYLVA. C. A. 11th Cir. Certiorari denied. Reported below: 757 F. 2d 1112.

No. 85–502. NATIONAL ASSOCIATION OF BROADCASTERS ET AL. *v.* QUINCY CABLE TV, INC., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 248 U. S. App. D. C. 1, 768 F. 2d 1434.

No. 85–1372. OHIO *v.* THOMAS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY. C. A. 6th Cir. Certiorari denied. Reported below: 776 F. 2d 1333.

No. 85–1382. ROSE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 775 F. 2d 1166.

No. 85–1405. MACKENZIE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 777 F. 2d 811.

No. 85–1441. WASHINGTON ET AL. *v.* HAWAII ET AL. Sup. Ct. Haw. Certiorari denied. Reported below: 68 Haw. —, 708 P. 2d 129.

No. 85–1546. MID-STATE HOMES, INC. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 1001.

No. 85–1561. ORGANIZED FISHERMEN OF FLORIDA ET AL. *v.* HODEL, SECRETARY OF THE INTERIOR, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 775 F. 2d 1544.

No. 85–1591. SCHWANECKE ET AL. *v.* ALI ET AL. Ct. App. Tex., 1st Sup. Jud. Dist. Certiorari denied.

No. 85–1600. BOARD OF COUNTY COMMISSIONERS OF BERNALILLO COUNTY ET AL. *v.* FRIEDMAN. C. A. 10th Cir. Certiorari denied. Reported below: 781 F. 2d 777.

No. 85–1602. TEXAS *v.* VAN GUILDER. Ct. Crim. App. Tex. Certiorari denied. Reported below: 709 S. W. 2d 178.

No. 85–1625. Pearl Investment Co. *v.* City and County of San Francisco. C. A. 9th Cir. Certiorari denied. Reported below: 774 F. 2d 1460.

No. 85–1665. Probe et al. *v.* California State Teachers' Retirement System et al. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 2d 776.

No. 85–1667. Rhode *v.* San Jacinto County, Texas. C. A. 5th Cir. Certiorari denied. Reported below: 776 F. 2d 107.

No. 85–1684. Colletti et al. *v.* County of Prince William, Virginia. Cir. Ct. Prince William County, Va. Certiorari denied.

No. 85–1686. Bussanich et al. *v.* United States Lines, Inc. Ct. App. N. Y. Certiorari denied. Reported below: 67 N. Y. 2d 1, 489 N. E. 2d 1042.

No. 85–1692. Lovelace *v.* Ametek, Inc. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 111 App. Div. 2d 953, 490 N. Y. S. 2d 49.

No. 85–1699. LaSalle National Bank of Chicago, Trustee, et al. *v.* County of DuPage et al. C. A. 7th Cir. Certiorari denied. Reported below: 777 F. 2d 377.

No. 85–1700. First Fidelity Bancorporation et al. *v.* Parell, Commissioner of Banking of the State of New Jersey, et al. C. A. 3d Cir. Certiorari denied. Reported below: 783 F. 2d 360.

No. 85–1701. Powell *v.* Chesapeake & Potomac Telephone Company of Virginia et al. C. A. 4th Cir. Certiorari denied. Reported below: 780 F. 2d 419.

No. 85–1705. Felder *v.* Seafarers' International Union of North America et al. C. A. 9th Cir. Certiorari denied. Reported below: 779 F. 2d 56.

No. 85–1706. Clark *v.* Indiana Department of Public Welfare et al. Ct. App. Ind. Certiorari denied. Reported below: 478 N. E. 2d 699.

No. 85–1709. Cross *v.* General Motors Corp. et al. C. A. 8th Cir. Certiorari denied. Reported below: 778 F. 2d 468.

No. 85-1712. WILSMANN *v.* UPJOHN CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 775 F. 2d 713.

No. 85-1715. CITY HOSPITAL OF BELLAIRE *v.* DELGUZZO, EXECUTRIX OF THE ESTATE OF DELGUZZO. Ct. App. Ohio, Belmont County. Certiorari denied.

No. 85-1718. MORGAN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 177 Cal. App. 3d 466, 225 Cal. Rptr. 673.

No. 85-1719. OWENS ET AL. *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 85-1734. CONNOR ET AL. *v.* PHILLIPS ET AL. Sup. Ct. N. J. Certiorari denied.

No. 85-1744. ESSNER *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari denied. Reported below: 785 F. 2d 38.

No. 85-1753. UNRUH *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 713 P. 2d 370.

No. 85-1760. PAPALINI ET AL. *v.* FITHIAN. Sup. Ct. Mich. Certiorari denied. Reported below: 424 Mich. 77, 378 N. W. 2d 467.

No. 85-1774. LEVIN *v.* GUEST. Ct. App. N. Y. Certiorari denied. Reported below: 67 N. Y. 2d 629, 490 N. E. 2d 546.

No. 85-1777. FARLEY *v.* ITT LIFE INSURANCE CORP. C. A. 10th Cir. Certiorari denied. Reported below: 783 F. 2d 978.

No. 85-1794. SAGERMARK *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 2d 645.

No. 85-1807. ZLOTNICKI *v.* HARSCO CORP. C. A. 3d Cir. Certiorari denied. Reported below: 779 F. 2d 906.

No. 85-1830. KADIN CORP. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 782 F. 2d 175.

No. 85-1832. HEAD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 783 F. 2d 1422.

No. 85-1841. ROBINSON, BY HIS GUARDIAN AD LITEM, YOUNG *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 4th Cir. Certiorari denied. Reported below: 783 F. 2d 1144.

No. 85-1850. YARIS ET AL., ON THEIR OWN BEHALF AND AS NEXT FRIENDS OF YARIS, ET AL. *v.* MALLORY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 780 F. 2d 724.

No. 85-6519. BROWN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 768.

No. 85-6536. FERRI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 778 F. 2d 985.

No. 85-6540. ANDREWS *v.* BECHTEL CORP. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 780 F. 2d 124.

No. 85-6620. CASTALDI *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 783 F. 2d 119.

No. 85-6699. MCCAFFERTY *v.* SOUTH DAKOTA. Sup. Ct. S. D. Certiorari denied. Reported below: 384 N. W. 2d 323.

No. 85-6705. SELLERS *v.* STEIN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 786 F. 2d 1166.

No. 85-6710. KOENIG *v.* FOSHEIM ET AL. C. A. 8th Cir. Certiorari denied.

No. 85-6713. CAREY *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 85-6716. SUTTON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 85-6717. OBOLENSKY *v.* POTTER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 38.

No. 85-6718. WILLIAMS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 784 F. 2d 402.

No. 85-6724. MAYORGA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 171 Cal. App. 3d 929, 218 Cal. Rptr. 830.

No. 85-6726. ALLEN *v.* GILMORE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 785 F. 2d 1035.

No. 85-6729. GORDON *v.* NUCCI ET AL. C. A. 1st Cir. Certiorari denied.

No. 85-6731. WRIGHT *v.* COLLINS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 782 F. 2d 1037.

No. 85-6733. JOHNSON *v.* ONION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 787 F. 2d 586.

No. 85-6734. WAHID *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 716 P. 2d 678.

No. 85-6737. RANDOLPH *v.* MUNCY, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 780 F. 2d 1018.

No. 85-6738. RAPPUHN *v.* DAVIS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 785 F. 2d 310.

No. 85-6739. SMITH *v.* ABSHIRE, SUPERINTENDENT, RIVERSIDE CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 786 F. 2d 1166.

No. 85-6744. KINDER *v.* KEITH. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 703 S. W. 2d 53.

No. 85-6745. DAY *v.* ATTWELL ET AL. C. A. 5th Cir. Certiorari denied.

No. 85-6746. DAY *v.* ALLSTATE INSURANCE CO. C. A. 8th Cir. Certiorari denied. Reported below: 794 F. 2d 678.

No. 85-6750. REED *v.* STANTON CORRECTIONAL CENTER ET AL. C. A. 11th Cir. Certiorari denied.

No. 85-6758. JACKSON *v.* SOUTH DAKOTA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 786 F. 2d 1169.

No. 85-6798. MARTIN *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 10th Cir. Certiorari denied.

No. 85-6820. ANDREZ *v.* DEPARTMENT OF THE AIR FORCE. C. A. Fed. Cir. Certiorari denied. Reported below: 785 F. 2d 326.

No. 85-6864. BURKE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 784 F. 2d 1090.

No. 85-6867. CRAWFORD ET AL. *v.* METROPOLITAN IMPEX, INC. C. A. 2d Cir. Certiorari denied. Reported below: 800 F. 2d 1127.

No. 85-6875. JACKSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 781 F. 2d 1114.

No. 85-6876. LITTLEHALES *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 22 M. J. 17.

No. 85-6885. STEELE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 786 F. 2d 1171.

No. 85-6887. CRUZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 783 F. 2d 1470.

No. 84-900. NEW ENGLAND TELEPHONE & TELEGRAPH CO. *v.* PUBLIC UTILITIES COMMISSION OF MAINE ET AL. C. A. 1st Cir. Certiorari denied. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 742 F. 2d 1.

No. 85-1544. BURLINGTON NORTHERN INC. *v.* ANDERSON. Sup. Ct. Mont. Motion of Association of American Railroads et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: —— Mont. ——, 709 P. 2d 641.

No. 85-1629. INTERNATIONAL MOLDERS & ALLIED WORKERS UNION, AFL-CIO, ET AL. *v.* HOWARD ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE MARSHALL would grant certiorari. Reported below: 779 F. 2d 1546.

No. 85-1641. MULLIGAN *v.* HAZARD ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 777 F. 2d 340.

JUSTICE WHITE, with whom JUSTICE MARSHALL joins, dissenting.

In *Wilson* v. *Garcia*, 471 U. S. 261 (1985), we held that an action brought under 42 U. S. C. § 1983 should be considered a personal injury action for purposes of borrowing an appropriate state statute of limitations. Since our decision in that case, the Courts of Appeals have differed on whether *Wilson* should be given retroactive effect. In the present case, the Sixth Circuit held, without qualification, that *Wilson* should be given retroactive effect. 777 F. 2d 340 (1985). The Courts of Appeals for the Fifth and Eleventh Circuits have reached similar results. *Gates* v. *Spinks*, 771 F. 2d 916 (CA5 1985), cert. denied, 475 U. S. 1065 (1986); *Jones* v. *Preuit & Mauldin*, 763 F. 2d 1250 (CA11 1985), cert. denied, 474 U. S. 1105 (1986). Two other Courts of Appeals, however, have determined that when retroactive application would shorten the statute of limitations, *Wilson* merits only prospective relief. *Gibson* v. *United States*, 781 F. 2d 1334 (CA9 1986); *Jackson* v. *City of Bloomfield*, 731 F. 2d 652 (CA10 1984). Although the Third and Eighth Circuits have applied *Wilson* retroactively in certain cases, it is unclear whether their holdings are designed to have universal application. See *Wycoff* v. *Menke*, 773 F. 2d 983, 986–987 (CA8 1985); *Fitzgerald* v. *Larson*, 769 F. 2d 160, 162–164 (CA3 1985); *Smith* v. *City of Pittsburgh*, 764 F. 2d 188, 194–196 (CA3 1985).

In addition, the Courts of Appeals also have reached conflicting results concerning what should be done when more than one state statute of limitations applies to personal injury actions. In *Hamilton* v. *City of Overton Park*, 730 F. 2d 613 (1984) (en banc), cert. denied, 471 U. S. 1052 (1985), and *Mismash* v. *Murray City*, 730 F. 2d 1366 (1984) (en banc), cert. denied, 471 U. S. 1052 (1985), the Tenth Circuit rejected, for § 1983 purposes, the state statute of limitations for intentional torts, and chose instead a State's residual statute of limitations. See generally *Preuit & Mauldin* v. *Jones*, 474 U. S. 1105, 1106–1107 (1986) (WHITE, J. dissenting from denial of certiorari). The Eleventh Circuit in *Jones* v. *Preuit & Mauldin*, *supra*, the Fifth Circuit in *Gates* v. *Spinks*, *supra*, and the Sixth Circuit in the present case, however, follow a different rule, and select the state statute of limitations governing intentional torts.

The Court's decision not to review the instant case marks the third time this Term that it has refused to address these differences that exist between the Courts of Appeals; differences that are not likely to disappear without guidance from this Court. Given the square conflicts among the Circuits, and the frequency with which these cases arise, I would grant the petition for certiorari in this case.

No. 85–1710. MALLINCKRODT, INC. *v.* BENNETT ET AL. Ct. App. Mo., Eastern Dist. Motions of Syncor International Corp., American College of Radiology, Society of Nuclear Medicine et al., and American College of Nuclear Physicians for leave to file briefs as *amici curiae* granted. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Certiorari denied. JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE O'CONNOR would grant certiorari. Reported below: 698 S. W. 2d 854.

No. 85–5555. MOORE *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 774 F. 2d 97.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

The petitioner in this case was sentenced to death by a jury that was "led to believe that the responsibility for determining the appropriateness of [his] death rests elsewhere," *Caldwell* v. *Mississippi*, 472 U. S. 320, 329 (1985). Under our recent decision in *Caldwell*, petitioner's sentence cannot stand unless this error "had no effect on the sentencing decision," *id.*, at 341, a point the courts below did not consider and the State does not contest here. I would therefore grant the petition for certiorari, vacate the District Court's judgment, and remand for reconsideration in light of *Caldwell.*

At the penalty phase of petitioner's trial, the prosecutor argued:

> "And it's a tough thing to ask, but there is only one penalty really available for this type of crime and that is the death penalty. This is where it will begin. From the next point forward it goes through the court system to be thoroughly reviewed and checked, through every court in this land. But it has to begin here, right here with the jury." App. to Pet. for Cert. 10; *State* v. *Moore*, 414 So. 2d 340, 347 (La. 1982).

On direct appeal to the Louisiana Supreme Court, petitioner argued that these statements had injected passion, prejudice, or other arbitrary factors into the sentencing determination. That court, while admitting that the prosecutor's argument was "close to reversible error," *ibid.*, concluded that the argument had not diminished the jury's sense of responsibility for its sentencing decision. The Fifth Circuit, reviewing the District Court's rejection of the same claim in petitioner's first federal habeas petition, reached the same conclusion. *Moore* v. *Maggio*, 740 F. 2d 308, 320 (1984). Subsequently, this Court decided *Caldwell*, and petitioner filed a second habeas petition claiming that the prosecutor's argument violated the Eighth Amendment as construed in our decision in that case.

The District Court denied this petition, and the Court of Appeals denied a certificate of probable cause. 774 F. 2d 97 (1985). The latter court held that the *Caldwell* claim had been raised in petitioner's first application, and was therefore barred by Rule 9(b) of the Rules Governing Section 2254 Cases, and by the principles enunciated in *Sanders* v. *United States*, 373 U. S. 1 (1963). The court also concluded that its prior determination that the prosecutor's argument had not diminished the jury's sense of responsibility, see 740 F. 2d, at 320, was "consistent with the rule set forth in *Caldwell*." 774 F. 2d, at 98. Even had the *Caldwell* claim not been raised previously, the court held, it would have denied that claim as an abuse of the writ, because a competent lawyer would have been aware of the possibility of such a claim.

The Court of Appeals was mistaken in believing that its prior pronouncement that the jury's sense of responsibility was not diminished disposed of the *Caldwell* claim. The prosecutor's argument in this case is essentially identical to the argument held unconstitutional in *Caldwell*. The lesson of *Caldwell*, at a minimum, is that a misleading or incomplete statement concerning appellate review of a death sentence *necessarily* diminishes the jury's sense of responsibility. In the present case, no less than in *Caldwell*, the jury may have "harbor[ed] misconceptions about the power of state appellate courts or, for that matter, *this* Court to override a jury's sentence of death." 472 U. S., at 342 (O'CONNOR, J., concurring in part and concurring in judgment). Under those circumstances, we cannot be confident that the jury did not conclude that the ultimate responsibility for petitioner's fate rested elsewhere.

This case, then, falls squarely within the "ends of justice" exception to the general rule forbidding successive assertions of the same claim on habeas, see *Sanders*, *supra*, at 16–17. In *Sanders*, this Court held that "[i]f purely legal questions are involved, the applicant may be entitled to a new hearing upon showing an intervening change in the law." 373 U. S., at 17. *Caldwell* constitutes an intervening change in the law concerning the precise argument used by the prosecutor in this case—a change that requires reexamination of the Court of Appeals' earlier conclusion about the effect of that argument on the jury. The clear import of *Sanders* is that petitioner is entitled to present his claim to the federal courts, and I therefore dissent from the denial of certiorari.

No. 85-5868. MAPES *v.* OHIO. Sup. Ct. Ohio;
No. 85-5886. RAULT *v.* LOUISIANA. C. A. 5th Cir.;
No. 85-5979. HARPER *v.* KENTUCKY. Sup. Ct. Ky.;
No. 85-5986. JONES *v.* LOUISIANA. Sup. Ct. La.;
No. 85-6048. GILMORE *v.* MISSOURI. Sup. Ct. Mo.;
No. 85-6389. FOSTER, AKA LEE *v.* MISSOURI. Sup. Ct. Mo.;
No. 85-6390. CAVE *v.* FLORIDA. Sup. Ct. Fla.;
No. 85-6456. KIRKPATRICK *v.* BLACKBURN, WARDEN. C. A. 5th Cir.;
No. 85-6547. HARICH *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Fla.;
No. 85-6771. SUAREZ *v.* FLORIDA. Sup. Ct. Fla.; and
No. 85-6932. EVANS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: No. 85-5868, 19 Ohio St. 3d 108, 484 N. E. 2d 140; No. 85-5886, 772 F. 2d 117 and 774 F. 2d 675; No. 85-5979, 694 S. W. 2d 665; No. 85-5986, 474 So. 2d 919; No. 85-6048, 697 S. W. 2d 172; No. 85-6389, 700 S. W. 2d 440; No. 85-6390, 476 So. 2d 180; No. 85-6456, 777 F. 2d 272; No. 85-6547, 484 So. 2d 1237; No. 85-6771, 481 So. 2d 1201; No. 85-6932, 485 So. 2d 276.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 85-6707. GOLUB *v.* ERNST & ERNST (WHINNEY) ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 779 F. 2d 38.

No. 85-6721. TONEY-EL *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 777 F. 2d 1224.

Rehearing Denied

No. 84–1288. EVANS, GOVERNOR OF IDAHO, ET AL. *v.* JEFF D. ET AL., MINORS, BY AND THROUGH THEIR NEXT FRIEND, JOHNSON, ET AL., 475 U. S. 717;

No. 85–1095. AAMODT ET UX. *v.* UNITED STATES NUCLEAR REGULATORY COMMISSION ET AL., 475 U. S. 1082;

No. 85–1407. CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., ET AL. *v.* PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, 475 U. S. 1114;

No. 85–1478. BOYCE *v.* RIDGELY ET AL., PERSONAL REPRESENTATIVES OF THE ESTATE OF BOYCE, 475 U. S. 1123;

No. 85–6431. DALE *v.* SOUTH DAKOTA, 475 U. S. 1126; and

No. 85–6499. STARADUMSKY *v.* RHODE ISLAND, 475 U. S. 1114. Petitions for rehearing denied.

No. 85–6003. HURLEY *v.* HONGISTO ET AL., 475 U. S. 1025. Motion for leave to file petition for rehearing denied.

JUNE 10, 1986

Miscellaneous Order

No. A–959. KEMP, WARDEN *v.* COLLINS. Application of the Attorney General of Georgia for an order to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Eleventh Circuit, presented to JUSTICE POWELL, and by him referred to the Court, denied.

JUNE 11, 1986

Certiorari Granted. (See No. 84–495, *ante*, at 747.)

JUNE 16, 1986

Dismissal Under Rule 53

No. 85–1852. BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES *v.* BURLINGTON NORTHERN RAILROAD CO. ET AL. C. A. 7th Cir. Certiorari before judgment dismissed under this Court's Rule 53.

Appeals Dismissed

No. 84–1724. SNIDER ET AL. *v.* VIRGINIA. Appeal from Sup. Ct. Va. dismissed for want of substantial federal question.

No. 85-1459. POWELL *v.* POWELL. Appeal from Ct. App. Tex., 10th Sup. Jud. Dist., dismissed for want of substantial federal question. JUSTICE WHITE would postpone further consideration of question of jurisdiction to a hearing of the case on the merits. Reported below: 703 S. W. 2d 434.

No. 85-1754. BOBER ET AL. *v.* WALGREEN CO. ET AL. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. JUSTICE BRENNAN would note probable jurisdiction and set case for oral argument. JUSTICE WHITE took no part in the consideration or decision of this case. Reported below: 111 Ill. 2d 120, 488 N. E. 2d 980.

Certiorari Granted—Vacated and Remanded

No. 85-279. AMERICAN PETROFINA COMPANY OF TEXAS *v.* OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION LOCAL NO. 4-23 ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U. S. 643 (1986). Reported below: 759 F. 2d 512.

Miscellaneous Orders

No. — — ——. COMSIA *v.* MORRIS, JUDGE. Motion to direct the Clerk to file a petition for writ of certiorari out of time denied.

No. A-925 (85-1962). RIDDICK ET AL. *v.* SCHOOL BOARD OF CITY OF NORFOLK ET AL. C. A. 4th Cir. Application for an injunction, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. JUSTICE MARSHALL and JUSTICE BLACKMUN would grant the application. JUSTICE STEVENS would expedite consideration of the petition for writ of certiorari and postpone action on the application pending such consideration.

No. A-934 (85-7008). LESKO *v.* PENNSYLVANIA. Sup. Ct. Pa. Application for stay of execution of sentence of death, presented to JUSTICE BRENNAN, and by him referred to the Court, is granted pending the disposition of the petition for writ of certiorari.

No. 84-1904. UNITED STATES DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS *v.* GALIOTO. D. C. N. J. [Probable jurisdiction noted, 474 U. S. 943.] Motion of the Solicitor General for leave to file a supplemental brief after argument granted.

No. 85–1233. INTERNATIONAL PAPER CO. *v.* OUELLETTE ET AL. C. A. 2d Cir. [Certiorari granted, 475 U. S. 1081.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85–1773. OBERLY, ATTORNEY GENERAL OF DELAWARE, ET AL. *v.* BALTIMORE & OHIO RAILROAD CO. ET AL. Appeal from C. A. 3d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 85–6878. WILSON *v.* UNITED STATES. C. A. Fed. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until July 7, 1986, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 85–6775. IN RE AYERS. Petition for writ of mandamus denied.

No. 85–6789. IN RE HOSEY. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 85–1385. UNITED STATES *v.* GENERAL DYNAMICS CORP. ET AL. C. A. Fed. Cir. Certiorari granted. Reported below: 773 F. 2d 1224.

No. 85–1581. SOLORIO *v.* UNITED STATES. Ct. Mil. App. Certiorari granted. Reported below: 21 M. J. 251.

No. 85–1630. HEWITT ET AL. *v.* HELMS. C. A. 3d Cir. Certiorari granted. Reported below: 780 F. 2d 367.

Certiorari Denied

No. 85–372. CHRISTENSEN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 755 F. 2d 705.

No. 85–1380. WOODHOUSE *v.* UNITED STATES BUREAU OF INDIAN AFFAIRS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 2d 614.

No. 85-1401. TEMPLE UNIVERSITY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 769 F. 2d 126.

No. 85-1411. MCCALLUM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 788 F. 2d 1042.

No. 85-1415. WOLFENBARGER ET AL. *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 710 P. 2d 114.

No. 85-1453. COLORADO FLYING ACADEMY, INC., ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 724 F. 2d 871.

No. 85-1483. MAIKOVSKIS *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. Reported below: 773 F. 2d 435.

No. 85-1559. POSNER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 780 F. 2d 1536.

No. 85-1560. RUBIO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 780 F. 2d 533.

No. 85-1605. RHODES ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 779 F. 2d 1019.

No. 85-1651. WNEV-TV, NEW ENGLAND TELEVISION CORP. *v.* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1228, AFL-CIO. C. A. 1st Cir. Certiorari denied. Reported below: 778 F. 2d 46.

No. 85-1685. HERBERT *v.* LANDO ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 781 F. 2d 298.

No. 85-1732. TAKAHASHI *v.* BOARD OF TRUSTEES OF LIVINGSTON UNION SCHOOL DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 783 F. 2d 848.

No. 85-1733. MCANINCH, EXECUTOR OF THE ESTATE OF MCANINCH, ET AL. *v.* TRADERS NATIONAL BANK OF KANSAS CITY. C. A. 8th Cir. Certiorari denied. Reported below: 779 F. 2d 466.

No. 85-1740. KANANEN ET UX. *v.* SUN BANK OKEECHOBEE, FKA COMMERCIAL BANK OKEECHOBEE, FLORIDA, ET AL. Dist.

Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 482 So. 2d 362.

No. 85–1746. MARGULIS *v.* MILLER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 2d 1027.

No. 85–1757. AZIMA *v.* FLORIDA DEPARTMENT OF PROFESSIONAL REGULATION, BOARD OF MEDICAL EXAMINERS. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 473 So. 2d 761.

No. 85–1764. BUCK *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 11 Kan. App. 2d xl, 713 P. 2d 494.

No. 85–1769. PROCTOR ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 781 F. 2d 752.

No. 85–1771. LECOUNT *v.* BETHLEHEM STEEL CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 785 F. 2d 312.

No. 85–1775. MACURDY *v.* DAUER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 780 F. 2d 1015.

No. 85–1776. HOLDING *v.* SOVRAN BANK. Cir. Ct. Powhatan County, Va. Certiorari denied.

No. 85–1781. FOTLAND ET AL. *v.* COMMISSIONER OF PATENTS AND TRADEMARKS. C. A. Fed. Cir. Certiorari denied. Reported below: 779 F. 2d 31.

No. 85–1812. DEUTSCH *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 103 N. M. 752, 713 P. 2d 1008.

No. 85–1836. CHEHADE *v.* SHEHADE. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 137 Ill. App. 3d 692, 484 N. E. 2d 1253.

No. 85–1872. COOK *v.* PETER KIEWIT SON'S CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 775 F. 2d 1030.

No. 85–1879. MURPHY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 85–1880. KEPLINGER ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 776 F. 2d 678.

No. 85-1909. MOSLEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 786 F. 2d 1330.

No. 85-6388. MAGGITT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 778 F. 2d 1029.

No. 85-6417. NAPUE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 85-6527. GRAY *v.* CODY, ATTORNEY GENERAL OF TENNESSEE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 779 F. 2d 50.

No. 85-6562. BAXTER *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 249 U. S. App. D. C. 210, 774 F. 2d 510.

No. 85-6599. HIGHIGHI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 782 F. 2d 1033.

No. 85-6600. WOOD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 780 F. 2d 955.

No. 85-6633. MITCHELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 777 F. 2d 248.

No. 85-6655. MORMON *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 782 F. 2d 1045.

No. 85-6664. OWENS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 782 F. 2d 862.

No. 85-6695. REMINGTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 783 F. 2d 1061.

No. 85-6760. WATSON *v.* MCCOTTER. C. A. 10th Cir. Certiorari denied. Reported below: 782 F. 2d 143.

No. 85-6764. LEECAN *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 198 Conn. 517, 504 A. 2d 480.

No. 85-6774. JUDD *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 786 F. 2d 1174.

No. 85-6779. STEVENS *v.* FULCOMER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON. C. A. 3d Cir. Certiorari denied. Reported below: 782 F. 2d 1033.

No. 85–6784. SAMPLES *v.* KEENEY, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 785 F. 2d 317.

No. 85–6786. RICHARDSON *v.* LOUISIANA STATE PAROLE BOARD ET AL. C. A. 5th Cir. Certiorari denied.

No. 85–6787. RUSSO *v.* HARTIGAN, ATTORNEY GENERAL OF ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 780 F. 2d 712.

No. 85–6788. PENDLETON *v.* NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 1.

No. 85–6795. YARBOROUGH *v.* YARBOROUGH. Fam. Ct. of Darlington County, S. C. Certiorari denied.

No. 85–6800. TARKOWSKI *v.* WOLFF ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 787 F. 2d 595.

No. 85–6804. LOVE *v.* YOUNG, SUPERINTENDENT, WAUPUN CORRECTIONAL INSTITUTION. C. A. 7th Cir. Certiorari denied. Reported below: 781 F. 2d 1307.

No. 85–6805. GREENE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 783 F. 2d 1364.

No. 85–6808. WRIGHT *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 786 F. 2d 1159.

No. 85–6809. MARTINEZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 85–6810. HERSHIPS *v.* FOUNDERS TITLE CO., INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 785 F. 2d 315.

No. 85–6811. DIEBOLD *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 67 N. Y. 2d 761, 491 N. E. 2d 289.

No. 85–6814. SMITH *v.* NEWSOME, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 85-6830. MCCREARY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 785 F. 2d 184.

No. 85-6849. SMITH *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 305 Md. 489, 505 A. 2d 511.

No. 85-6852. SHEWARD *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 481 N. E. 2d 181.

No. 85-6879. GOLDSMITH *v.* JOHNSON, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 786 F. 2d 1179.

No. 85-6913. DANIEL *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 785 F. 2d 323.

No. 85-6923. MORSE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 785 F. 2d 771.

No. 85-6924. LARSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 788 F. 2d 9.

No. 85-6927. GARCIA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 786 F. 2d 1157.

No. 85-6931. TERROVONA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 785 F. 2d 767.

No. 84-2023. INDEPENDENT BANKERS ASSOCIATION OF NEW YORK STATE, INC., ET AL. *v.* MARINE MIDLAND BANK, N. A., ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 757 F. 2d 453.

No. 85-1479. STONE & WEBSTER ENGINEERING CORP. *v.* LINDLEY ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 780 F. 2d 797.

No. 85-1316. PULASKI COUNTY SPECIAL SCHOOL DISTRICT NO. 1 ET AL. *v.* LITTLE ROCK SCHOOL DISTRICT ET AL.; and

No. 85-1547. ARKANSAS STATE BOARD OF EDUCATION ET AL. *v.* LITTLE ROCK SCHOOL DISTRICT ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE POWELL would grant certiorari. Reported below: 778 F. 2d 404.

No. 85-1593. COUGHLIN ET UX. *v.* WESTINGHOUSE BROADCASTING & CABLE, INC. C. A. 3d Cir. Certiorari denied. Reported below: 780 F. 2d 340.

CHIEF JUSTICE BURGER, with whom JUSTICE REHNQUIST joins, dissenting.

In *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U. S. 749, 764 (1985) (BURGER, C. J., concurring in judgment), I wrote to express my agreement with JUSTICE WHITE that *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), should be reexamined. Petitioners in this petition ask this Court for such a reconsideration. I dissent from the Court's refusal to grant certiorari and give plenary attention to this important issue.

Respondent conducted an investigation into the alleged failure of Philadelphia police to enforce state liquor laws against an "after hours" bar. In the course of that investigation, they hid a camera across the street from the bar and videotaped police officers entering and leaving the bar. Respondent ultimately broadcast a videotape of petitioner leaving a bar on October 11, 1981. The videotape stated that "the only paperwork we saw [petitioner] doing was *carrying this envelope* out of the Club less than a minute after he went in." A freeze frame with a circle around an object in petitioner's hand was used to emphasize the point. The announcer went on to say that the officer had difficulty finding the proper key to start his patrol car and that he was not wearing his uniform jacket or hat, "all standard items officers on patrol are required to have." The clear implication ofthe broadcast was that petitioner had accepted a bribe. Respondent made no attempt to obtain petitioner's explanation for these events other than an "ambush" interview four months after the fact. In this "interview," a reporter for respondent approached petitioner with cameras whirling as he came off of his all-night shift and asked what he had been doing four months earlier on the night of October 11, 1981. Petitioner said "this here is harassment" and declined to answer questions at that time.

Petitioner and his wife filed a libel suit in District Court. He alleged that even a minimal investigation of the events of that evening would have revealed that he was a rookie policeman, patrolling alone for the first time on October 11, 1981; that early in his shift, he was ordered to investigate a vandalism complaint at the bar; that after talking to the bar's steward, he returned to the patrol car and filled out his incident report book; and that he was not required to wear his jacket or hat while on patrol. Petitioner further alleged that the purported "envelope" was in fact nothing other than his incident report book. The District Court concluded that petitioner had raised a genuine issue of material fact concerning the truth of the allegedly defamatory statements and that the broadcast was capable of a defamatory interpretation. 603 F. Supp. 377 (ED Pa. 1985). Applying our decision in *New York Times Co.* v. *Sullivan*, however, the District Court concluded that petitioner had not introduced sufficient evidence of "actual malice" on the part of respondent to withstand a motion for summary judgment. The Court of Appeals affirmed, concluding that the District Court had properly evaluated petitioner's evidence of actual malice. 780 F. 2d 340 (CA3 1985). One judge concurred, observing that "[t]he *New York Times* standard makes it hard enough for a public figure to win a libel suit, even when faced, as here, with what any fair observer must agree is egregious conduct on the part of the media." *Id.*, at 349 (Becker, J.).

Petitioner has raised an important federal question that we should review. He has been accused of accepting a bribe on the basis of a cursory investigation, yet his libel suit to clear his name has been found to be constitutionally barred. The District Court observed: "An issue . . . exists as to whether [respondent], with a minimum of effort, could have discovered the truth. The Supreme Court's mandate, however, is clear: 'reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing.'" 603 F. Supp., at 388 (quoting *St. Amant* v. *Thompson*, 390 U. S. 727, 731 (1968)). I would grant certiorari and set this case for argument to determine whether the Court's "mandate" remains an appropriate one.

No. 85–1750. S/S SALVADOR ET AL. *v.* BERISFORD METALS CORP. C. A. 2d Cir. Motions of Inter-American Freight Conference, Star Shipping A/S, and American President Lines, Ltd., for leave to file briefs as *amici curiae* granted. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 779 F. 2d 841.

No. 85-6474. BUXTON *v.* TEXAS. Ct. Crim. App. Tex.; and No. 85-6773. WISEHART *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: No. 85-6474, 699 S. W. 2d 212; No. 85-6773, 484 N. E. 2d 949.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 85-1447. CABRIOLET PORSCHE + AUDI, INC. *v.* AMERICAN HONDA MOTOR CO., INC., 475 U. S. 1122;

No. 85-1509. VINTILLA ET AL. *v.* UNITED STATES STEEL CORPORATION PLAN FOR EMPLOYEE PENSION BENEFITS, 475 U. S. 1141;

No. 85-5925. BREWER *v.* GARNER, WARDEN, 475 U. S. 1141;

No. 85-5977. ISLEY *v.* UNITED STATES, 475 U. S. 1024;

No. 85-6325. JOHNSON *v.* MISSISSIPPI, *ante*, p. 1109;

No. 85-6364. IN RE MAY, 475 U. S. 1140;

No. 85-6494. HAKIM *v.* WOLVERINE PACKING CO., 475 U. S. 1142;

No. 85-6517. IN RE FRAZIER, 475 U. S. 1139; and

No. 85-6524. WASHINGTON *v.* ANGELONE, WARDEN, ET AL., *ante*, p. 1107. Petitions for rehearing denied.

No. 85-882. LOVSHIN *v.* DEPARTMENT OF THE NAVY, 475 U. S. 1111. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

REPORTER'S NOTE

The next page is purposely numbered 1301. The numbers between 1189 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

CALIFORNIA *v.* HAMILTON

ON APPLICATION FOR STAY

No. A–805. Decided May 6, 1986

California's application to stay enforcement of the California Supreme Court's judgment invalidating respondent's death sentence is granted. The State Supreme Court's judgment was based on its holdings that the failure to properly instruct the jury at respondent's murder trial on the issue of intent to kill violated his right to due process under *Sandstrom* v. *Montana*, 442 U. S. 510, and that such error was not harmless. The State seeks the stay so that it can petition for certiorari to raise the question of the proper constitutional standard for determining prejudice with regard to *Sandstrom* errors. Since the outcome here may well be affected by the decision in another, pending case, it is likely that a majority of this Court would not want to dispose of the petition for certiorari in this case before a decision is rendered in such other case.

JUSTICE REHNQUIST, Circuit Justice.

Applicant, the State of California, asks that I stay pending disposition of its petition for certiorari the enforcement of the judgment of the California Supreme Court, which invalidated the death sentence imposed on respondent Hamilton for the 1979 murder of a woman near San Diego. 41 Cal. 3d 408, 710 P. 2d 981 (1985). The jury was not instructed that it was required, as a matter of state law under *Carlos* v. *Superior Court*, 35 Cal. 3d 131, 672 P. 2d 862 (1983), to find that Hamilton intended to kill his victim before it could impose the death penalty. The California Supreme Court held that this failure to properly instruct the jury on the issue of intent violated Hamilton's right to due process under this Court's decision in *Sandstrom* v. *Montana*, 442 U. S. 510 (1979). 41 Cal. 3d, at 431, 710 P. 2d, at 995. The court also held that such

Sandstrom error was not harmless under the four-part test for harmlessness set forth in *People* v. *Garcia*, 36 Cal. 3d 539, 554–557, 684 P. 2d 826, 835–837 (1984), cert. denied, 469 U. S. 1229 (1985). In particular, the court concluded that the fourth part of the *Garcia* test, under which a *Sandstrom* error may be found harmless if "the record not only establishes the necessary intent as a matter of law but shows the contrary evidence not worthy of consideration," *Garcia*, *supra*, at 556, 684 P. 2d, at 835, did not apply to the instant case. 41 Cal. 3d, at 432, 710 P. 2d, at 995–996.

The State requests a stay so that it can petition for certiorari, raising the following question: "What is the proper standard of prejudice under the United States Constitution for errors in jury instructions regarding intent to kill in capital cases?" The State argues that the California Supreme Court misconstrued this Court's decision in *Connecticut* v. *Johnson*, 460 U. S. 73 (1983), when it set up in *Garcia* its four-part harmlessness test for *Sandstrom* errors, and that under a proper test the *Sandstrom* error in the instant case would be found harmless. The State also points out that, under California law, it will be forced to begin a new trial on the issue of Hamilton's sentence by May 12, 1986, or be forever barred from seeking the death penalty. See Cal. Penal Code Ann. § 1382(2) (West 1982). On the other hand, since the California Supreme Court affirmed Hamilton's murder conviction, he will remain confined whether or not a stay is granted.

This Court currently has before it the case of *Rose* v. *Clark*, No. 84–1974, which involves the question whether a *Sandstrom* error may ever be found harmless and, if so, under what circumstances. Our decision in *Rose* v. *Clark* may well affect the outcome of the instant case. For this reason, I believe that a majority of this Court would not want to dispose of the petition for certiorari in this case before a decision is rendered in *Rose* v. *Clark*. I therefore stay the enforcement of the judgment of the California Supreme Court pending further action by me or by the Court.

INDEX

ABORTIONS. See **Constitutional Law, IX; Jurisdiction.**

"ACQUITTAL" FOR DOUBLE JEOPARDY PURPOSES. See **Constitutional Law, IV, 2.**

ADMINISTRATIVE SEARCHES OF BUSINESS PREMISES. See **Constitutional Law, XI, 2.**

ADMIRALTY.

Defective ships' turbines—Products-liability claims.—Where (1) petitioners chartered ships from a shipbuilder, which had contracted with respondent to design, manufacture, and supervise installation of ships' turbines, (2) turbines malfunctioned due to design and manufacturing defects, causing damage to turbines only, and (3) petitioners filed a federal-court admiralty action against respondent for damages, alleging tortious conduct based on a products-liability theory, alleged torts fell within admiralty jurisdiction, but, whether stated in negligence or strict liability, no products-liability claim lies in admiralty when a commercial party alleges injury only to the product itself resulting in purely economic loss. East River S.S. Corp. v. Transamerica Delaval Inc., p. 858.

AERIAL OBSERVATION OR PHOTOGRAPHY OF PREMISES BY GOVERNMENT OFFICIALS. See **Constitutional Law, XI.**

AFFIRMATIVE-ACTION PLANS. See **Constitutional Law, VI, 4.**

AFLATOXIN IN FOOD. See **Federal Food, Drug, and Cosmetic Act.**

AGGRAVATING CIRCUMSTANCES IN CONSIDERING DEATH PENALTY. See **Constitutional Law, IV, 1.**

AID TO FAMILIES WITH DEPENDENT CHILDREN PROGRAM'S USE OF SOCIAL SECURITY NUMBERS. See **Constitutional Law, VII.**

ANTITRUST ACTS.

1. *Dentists' organization—X-ray policy—Restraint of trade.*—Where Federal Trade Commission ruled that respondent dentists' organization's policy requiring its members to withhold x rays from dental insurers in connection with evaluating patients' claims for benefits constituted an unfair method of competition in violation of Federal Trade Commission Act,

ANTITRUST ACTS—Continued.
since it amounted to a conspiratorial restraint of trade in violation of Sherman Act, FTC's factual findings regarding respondent's x-ray policy were supported by substantial evidence and were sufficient as a matter of law to establish a violation of Acts in question. FTC v. Indiana Federation of Dentists, p. 447.

2. *Motor carrier rates—Shippers' suit—Treble damages.*—Petitioner shippers were not entitled to bring a treble-damages antitrust action against respondent motor carriers and a ratemaking bureau, alleging that respondents engaged in a conspiracy, in violation of Sherman Act, to fix rates for transporting freight between United States and Canada without complying with an agreement filed by bureau with, and approved by, Interstate Commerce Commission. Square D Co. v. Niagara Frontier Tariff Bureau, p. 409.

ARMED FORCES VETERANS' PREFERENCE IN PUBLIC EMPLOYMENT. See **Constitutional Law, VI, 5.**

BALD EAGLE PROTECTION ACT. See **Indians, 1.**

BANK "DEPOSITS." See **Federal Deposit Insurance Corporation.**

BANK ROBBERY. See **Criminal Law, 2.**

BIAS OF JURORS. See **Constitutional Law, X, 2.**

CABLE TELEVISION FRANCHISES. See **Constitutional Law, VIII.**

CAPITAL PUNISHMENT. See **Constitutional Law, III; IV, 1; X; Stays.**

CASE OR CONTROVERSY. See **Jurisdiction.**

CATAWBA INDIAN TRIBE DIVISION OF ASSETS ACT.

Tribe's 1840 conveyance of land—Statute of limitations.—Act's redefinition of relationship between Federal Government and respondent Indian Tribe required application of South Carolina's statute of limitations in Tribe's federal-court action challenging validity of its 1840 conveyance of a tract of land to State. South Carolina v. Catawba Indian Tribe, Inc., p. 498.

CERTIORARI.

Dismissal of writ—Improvident grant.—Where (1) during collective-bargaining negotiations, Equal Employment Opportunity Commission refused to consider union's proposal that would require EEOC to comply with certain federal laws and regulations concerning "contracting out" by federal agencies, and (2) Federal Labor Relations Authority, upon union's petition for review, rejected EEOC's contentions that its refusal was warranted under certain federal laws, a writ of certiorari previously

CERTIORARI—Continued.

granted by this Court was dismissed as improvidently granted since EEOC's arguments here had not been properly asserted below. EEOC v. FLRA, p. 19.

CIVIL SERVICE REFORM ACT OF 1978. See Certiorari.

CLEAN AIR ACT. See Constitutional Law, XI, 2.

CODEFENDANT'S CONFESSION. See Constitutional Law, II.

COLLECTIVE-BARGAINING AGREEMENTS. See Certiorari; Constitutional Law, VI, 4.

COMMERCE CLAUSE. See Constitutional Law, I.

COMMUNICATIONS ACT OF 1934.

Intrastate telephone rates—Depreciation of property—Pre-emption of state regulation.—Notwithstanding Federal Communications Commission's authority to regulate interstate wire and radio communication and to prescribe rules for depreciating telephone plant and equipment, § 152(b) of Act, which precludes FCC jurisdiction as to "charges," "classifications," and "practices" respecting intrastate communication service, bars federal pre-emption of a state regulation governing depreciation of dual jurisdiction property for intrastate ratemaking purposes. Louisiana Public Service Comm'n v. FCC, p. 355.

COMPREHENSIVE EMPLOYMENT AND TRAINING ACT.

Recovery of misused funds—Limitations period.—Secretary of Labor did not lose power to recover misused federal funds—granted to a recipient (such as respondent county) under Act for programs to provide job training and employment opportunities for disadvantaged, unemployed, or underemployed persons—simply because Act's 120-day period for Secretary's determining misuse of funds expired after Labor Department's audit reports were filed before Secretary made final determination of misuse of funds. Brock v. Pierce County, p. 253.

COMPULSORY PROCESS CLAUSE. See Criminal Law, 1.

CONFESSION OF ACCUSED. See Criminal Law, 1.

CONFESSION OF CODEFENDANT. See Constitutional Law, II.

CONFRONTATION OF WITNESSES. See Constitutional Law, II; **Criminal Law,** 1.

CONSOLIDATED FARM AND RURAL DEVELOPMENT ACT. See Constitutional Law, V.

CONSTITUTIONAL LAW. See also **Criminal Law, 1; Internal Revenue Code, 1; Jurisdiction.**

I. Commerce Clause.

Liquor distillers—Wholesale prices—Validity of state statute.—Provision of a New York statute requiring that a state-licensed liquor distiller, in filing with State Liquor Authority monthly price schedule for in-state sales to wholesalers, include an affirmation that scheduled prices are no higher than lowest prices that distiller will charge wholesalers anywhere in country during month, on its face violates Commerce Clause, and Twenty-first Amendment does not save provision from invalidation under Commerce Clause. Brown-Forman Distillers Corp. v. New York State Liquor Authority, p. 573.

II. Confrontation of Witnesses.

Codefendant's confession—Admissibility against defendant.—Where petitioner and a codefendant, charged with a double murder, were tried jointly in a state-court bench trial at which neither testified, judge's reliance upon codefendant's confession as substantive evidence against petitioner with regard to her defenses that she did not participate in one murder and acted in self-defense or sudden passion in other, violated her rights under Sixth Amendment's Confrontation Clause. Lee v. Illinois, p. 530.

III. Cruel and Unusual Punishment.

Death penalty—Mitigating circumstances.—In sentencing phase of petitioner's state-court trial that resulted in convictions of capital murder and rape, trial court's exclusion from sentencing hearing before trial jury of testimony of petitioner's jailers and a "regular visitor" that he had made a "good adjustment" while in jail awaiting trial denied his constitutional right to place before sentencing jury all relevant evidence in mitigation of punishment. Skipper v. South Carolina, p. 1.

IV. Double Jeopardy.

1. *Death penalty—Reimposing after retrial.*—Where (1) petitioners were convicted of first-degree murder for killing bank-van guards during a robbery, (2) trial judge sentenced them to death upon finding that—although aggravating circumstance of "pecuniary gain" killing was not present because it applied only to contract killings—aggravating circumstance of "heinous killing" was present, (3) Court of Appeals, reversing and remanding for a retrial on other grounds, held that trial judge erred in finding presence of "heinous killing" circumstance, but that if petitioners were again convicted, trial judge could find presence of "pecuniary gain" circumstance since it was not limited to contract killings, and (4) petitioners were again convicted and sentenced to death on basis, *inter alia*, of "pecuniary gain" circumstance, Double Jeopardy Clause was not violated by reimposing death penalty. Poland v. Arizona, p. 147.

CONSTITUTIONAL LAW—Continued.

2. *Grant of demurrer—"Acquittal."*—Trial judge's grant of defendants' demurrer challenging sufficiency of prosecution's evidence at close of its case in chief at bench trial constituted an acquittal under Double Jeopardy Clause, and State's appeal was barred because reversal would have led to further trial proceedings. Smalis v. Pennsylvania, p. 140.

V. Due Process.

Emergency loans to farmers—Notice of program.—Regarding Secretary of Agriculture's and Farmers Home Administration's handling of a program for emergency loans to farmers who suffered economic losses as a result of natural disasters occurring during a certain period—which loans had more generous terms than those under later versions of authorizing statute—lower federal courts, in respondent farmers' action challenging adequacy of notice of program, erred in holding that Secretary's conduct violated notice procedures relevant to program's implementation, and injunctive relief requiring Administration to reopen program could not be supported on theory that inadequate notice deprived respondents of property without due process of law. Lyng v. Payne, p. 926.

VI. Equal Protection of the Laws.

1. *Exclusion of jurors because of race—Prosecutor's use of peremptory challenges.*—A prosecutor's use of peremptory challenges to strike individual jurors from trial jury solely because of their race violates equal protection principles; a defendant may establish a prima facie case of purposeful discrimination solely on evidence of prosecutor's exercise of peremptory challenges at defendant's trial, and once such showing is made, burden shifts to State to present a neutral explanation for challenging jurors. Batson v. Kentucky, p. 79.

2. *Illegitimate child—Inheritance from father.*—Where (1) appellant's father died at a time when a Texas statute prohibited an illegitimate child from inheriting from father unless parents had subsequently married, (2) four months after father's death, *Trimble* v. *Gordon*, 430 U. S. 762, held such statutes unconstitutional, and (3) appellant then filed a state-court claim to a share in her father's estate, Fourteenth Amendment interest in avoiding unjustified discrimination against illegitimate children required that appellant's claim be protected by full applicability of *Trimble*. Reed v. Campbell, p. 852.

3. *Social Security Act—Survivor's benefits.*—Equal protection principles were not violated by Social Security Act's provision that authorized survivor's benefits to a wage earner's widowed spouse who remarried after age 60 but not to a similarly situated divorced widowed spouse who remarried. Bowen v. Owens, p. 340.

CONSTITUTIONAL LAW—Continued.

4. *Teacher layoffs—Collective-bargaining provision—Affirmative action.*—Where (1) respondent Board of Education adhered to collective-bargaining agreement with teachers' union providing that seniority would generally govern layoffs but at no time would there be a greater percentage of minority personnel laid off than percentage employed at time of layoff, and (2) Board's adherence to agreement resulted in nonminority teachers being laid off while minority teachers with less seniority were retained, Court of Appeals erred in affirming District Court's judgment holding that layoff provision and racial preferences granted by Board were permissible under Equal Protection Clause. Wygant v. Jackson Bd. of Ed., p. 267.

5. *Veterans' preference in public employment—Validity of New York law.*—Where (1) New York law granted a civil service employment preference to New York residents who were honorably discharged military veterans, had served during time of war, and were New York residents when they entered military service, (2) appellee veterans, New York residents, were denied preference because they were not New York residents when they joined Army, (3) they brought an action alleging that residency requirement violated Equal Protection Clause and their constitutional right to travel, and (4) District Court dismissed complaint, Court of Appeals' reversal of District Court's judgment was affirmed. Attorney General of N. Y. v. Soto-Lopez, p. 898.

VII. Freedom of Religion.

Social Security number—Use in AFDC and Food Stamp programs.—Federal statutory requirement that state agencies utilize aid recipients' Social Security numbers in administering Aid to Families with Dependent Children program and Food Stamp program does not violate free exercise rights of recipients such as appellees, who asserted a violation of their Native American religious beliefs. Bowen v. Roy, p. 693.

VIII. Freedom of Speech.

Denial of cable television franchise—Dismissal of complaint.—Where respondent alleged a violation of its First Amendment free speech rights by petitioner city's refusal to grant respondent a cable television franchise and by petitioner Department of Water and Power's refusal to grant respondent access to power-line poles and underground conduits, District Court erred in dismissing complaint for failure to state a cause of action, since activities in which respondent sought to engage plainly implicated First Amendment interests and a fuller development of disputed factual issues was necessary. Los Angeles v. Preferred Communications, Inc., p. 488.

IX. Right to Abortion.

Pennsylvania statutory requirements—Information to be given to woman—Physician's duties.—In proceedings challenging validity of Penn-

CONSTITUTIONAL LAW—Continued.

sylvania abortion statute, Court of Appeals properly held to be unconstitutional provisions requiring, *inter alia*, (1) that a woman seeking an abortion be informed of specified matters, including availability of medical assistance, father's financial responsibilities if child was born, and detrimental effects and medical risks of an abortion, (2) that woman be furnished printed materials describing fetus and listing agencies offering alternatives to abortion, (3) that physician report such matters as woman's race, age, marital status, and prior pregnancies, and physician's basis for his determination, after first trimester, that child is not viable, (4) that a physician performing a postviability abortion use technique affording best opportunity for a live birth, unless it would present a significantly greater risk to woman's life or health, and (5) that a second physician attend a postviability abortion and take all reasonable steps necessary to preserve child's life and health. Thornburgh v. American College of Obstetricians & Gynecologists, p. 747.

X. Right to Jury Trial.

1. *Fair-cross-section representation—Bifurcated trial—"Death qualification" at guilt phase.*—Removal for cause, prior to guilt phase rather than sentencing phase of a state-court bifurcated murder trial, of prospective jurors whose opposition to death penalty would prevent or substantially impair performance of their duties as jurors at sentencing phase, does not violate Sixth Amendment's fair-cross-section requirement. Lockhart v. McCree, p. 162.

2. *Racial bias—Examination of jurors.*—A defendant accused of an interracial capital crime is entitled to have prospective jurors informed of victim's race and questioned on issue of racial bias. Turner v. Murray, p. 28.

XI. Searches and Seizures.

1. *Backyard of home—Naked-eye observation from airplane.*—Where (1) respondent's backyard was shielded from ground-level public view, (2) police officers flew in an airplane over premises at an altitude of 1,000 feet and readily identified marijuana plants growing in yard, and (3) a search warrant was obtained and plants were seized, Fourth Amendment was not violated by warrantless naked-eye aerial observation of yard, notwithstanding it was within curtilage of respondent's home, since officers' observation took place from public navigable airspace in a physically nonobtrusive manner. California v. Ciraolo, p. 207.

2. *EPA aerial observation of plant complex—Aerial photographs.*—Where (1) petitioner refused to permit Environmental Protection Agency to conduct an on-site inspection of petitioner's chemical plant complex, which was protected from ground-level public view, and (2) EPA did not then seek an administrative search warrant, but instead employed a com-

CONSTITUTIONAL LAW—Continued.

mercial aerial photographer, using a standard precision aerial mapping camera, to take photographs of complex from various altitudes within lawful navigable airspace, EPA's use of aerial observation and photography was within its authority under Clean Air Act, and its taking of photographs was not a search prohibited by Fourth Amendment. Dow Chemical Co. v. United States, p. 227.

"CONTRACTING OUT" BY FEDERAL AGENCIES. See **Certiorari.**

CRIMINAL LAW. See also **Constitutional Law,** II–IV; VI, 1; X; XI, 1; **Indians,** 1; **Speedy Trial Act; Stays.**

1. *Accused's confession—Circumstances of interrogation—Admissibility of evidence.*—Where (1) prior to petitioner's murder trial, state court determined that his confession was voluntary and refused to suppress it, (2) at trial, petitioner sought to introduce testimony describing length of interrogation and manner in which it was conducted, thereby hoping to show that confession was unworthy of belief, and (3) court ruled that testimony was inadmissible as pertaining solely to issue of voluntariness, exclusion of testimony deprived petitioner of his fundamental constitutional right—whether under Due Process Clause, Compulsory Process Clause, or Confrontation Clause—to a fair opportunity to present a defense. Crane v. Kentucky, p. 683.

2. *"Dangerous weapon"—Unloaded handgun.*—An unloaded handgun is a "dangerous weapon" within meaning of 18 U. S. C. § 2113(d). McLaughlin v. United States, p. 16.

CRUEL AND UNUSUAL PUNISHMENT. See **Constitutional Law,** III.

"CURTILAGE" OF HOME. See **Constitutional Law,** XI.

CUSTODIAL INTERROGATION OF ACCUSED. See **Criminal Law,** 1.

"DANGEROUS" WEAPONS. See **Criminal Law,** 2.

DEATH PENALTY. See **Constitutional Law,** III; IV, 1; X; **Stays.**

"DEATH QUALIFICATION" OF JURORS. See **Constitutional Law,** X, 1.

DELETERIOUS SUBSTANCES IN FOOD. See **Federal Food, Drug, and Cosmetic Act.**

DENTISTS' ORGANIZATION'S X-RAY POLICY. See **Antitrust Acts,** 1.

"DEPOSITS" IN BANKS. See **Federal Deposit Insurance Corporation.**

DEPRECIATION OF PROPERTY IN FIXING TELEPHONE RATES. See Communications Act of 1934.

DISABILITY BENEFITS. See Social Security Act, 1.

DISCRIMINATION AGAINST HANDICAPPED INFANTS. See Rehabilitation Act of 1973.

DISCRIMINATION AGAINST ILLEGITIMATE CHILDREN. See Constitutional Law, VI, 2.

DISCRIMINATION BASED ON RACE. See Constitutional Law, VI, 1, 4; X, 2.

DISCRIMINATION IN EMPLOYMENT. See Constitutional Law, VI, 4.

DISTRICT COURTS. See Admiralty.

DIVORCED SPOUSE'S REMARRIAGE AS AFFECTING SOCIAL SECURITY SURVIVOR'S BENEFITS. See Constitutional Law, VI, 3.

DOUBLE JEOPARDY. See Constitutional Law, IV.

DUE PROCESS. See Constitutional Law, V; Internal Revenue Code, 1; Stays.

EAGLE PRESERVATION. See Indians, 1.

EIGHTH AMENDMENT. See Constitutional Law, III.

ELECTRIC POWER RATES.

Interstate commerce—State Commission's order—Pre-emption by federal law.—Where (1) appellants, related corporations, owned hydroelectric powerplants that were operated by Tennessee Valley Authority under an arrangement whereby TVA furnished them with certain types of electric power, (2) one appellant sold power to North Carolina retail customers, (3) North Carolina Utilities Commission, in calculating rate to be charged that appellant's North Carolina customers, issued an order allocating types of power between that appellant and another appellant that sold its power to a Tennessee corporation, and (4) State Commission's order differed from allocation by Federal Energy Regulatory Commission in a wholesale rate-making proceeding, State Commission's allocation was pre-empted by federal law. Nantahala Power & Light Co. v. Thornburg, p. 953.

EMERGENCY LOANS TO FARMERS. See Constitutional Law, V.

EMPLOYER AND EMPLOYEES. See Certiorari; Constitutional Law, VI, 4, 5; National Labor Relations Act.

EMPLOYMENT DISCRIMINATION. See Constitutional Law, VI, 4.

ENDANGERED SPECIES ACT. See Indians, 1.

ENVIRONMENTAL PROTECTION AGENCY'S USE OF AERIAL OBSERVATION OR PHOTOGRAPHS. See **Constitutional Law, XI, 2.**

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law, VI.**

ESTATE TAXES. See **Internal Revenue Code, 1.**

EVIDENCE. See **Constitutional Law, II–IV; VI, 1; Criminal Law, 1.**

FAIR-CROSS-SECTION REPRESENTATION ON JURIES. See **Constitutional Law, X, 1.**

FARMERS' EMERGENCY LOANS. See **Constitutional Law, V.**

FEDERAL DEPOSIT INSURANCE CORPORATION.

Standby letter of credit—Insured "deposit."—A standby letter of credit issued by a bank to a third party—which letter provided that a draft drawn on it would be honored if third party's customer failed to pay third party for goods, and which was backed by customer's promissory note to bank contingent on third party's presenting drafts on letter of credit after customer's nonpayment—does not constitute a "deposit" so as to be insured in third party's favor when bank became insolvent and Federal Deposit Insurance Corporation became its receiver. FDIC v. Philadelphia Gear Corp., p. 426.

FEDERAL ESTATE TAX. See **Internal Revenue Code, 1.**

FEDERAL FOOD, DRUG, AND COSMETIC ACT.

Aflatoxin in food—Tolerance level—FDA's discretion.—Food and Drug Administration's interpretation of § 346 of Act—as giving FDA discretion whether to promulgate tolerance levels for poisonous or deleterious substances in food so as to excuse its failure to set a tolerance level for aflatoxin before allowing shipment of tainted corn—was sufficiently rational to preclude a court from substituting its judgment for FDA's. Young v. Community Nutrition Institute, p. 974.

FEDERAL GIFT TAX. See **Internal Revenue Code, 1.**

FEDERAL INCOME TAX. See **Internal Revenue Code, 2.**

FEDERAL-STATE RELATIONS. See **Communications Act of 1934; Constitutional Law, I; Electric Power Rates; Indians, 2; National Labor Relations Act; Rehabilitation Act of 1973.**

FEDERAL TRADE COMMISSION ACT. See **Antitrust Acts, 1.**

FIFTH AMENDMENT. See **Constitutional Law, IV; VI, 3.**

FIREARMS. See **Criminal Law, 2.**

FIRST AMENDMENT. See **Constitutional Law, VII; VIII.**

FOOD REGULATIONS. See **Federal Food, Drug, and Cosmetic Act.**

FOOD STAMP PROGRAM'S USE OF SOCIAL SECURITY NUMBERS. See **Constitutional Law, VII.**

FOURTEENTH AMENDMENT. See **Constitutional Law, VI, 1, 2, 4, 5; Criminal Law, 1.**

FOURTH AMENDMENT. See **Constitutional Law, XI.**

FRANCHISES FOR CABLE TELEVISION. See **Constitutional Law, VIII.**

FREEDOM OF RELIGION. See **Constitutional Law, VII.**

FREEDOM OF SPEECH. See **Constitutional Law, VIII.**

GENERAL ALLOTMENT ACT OF 1887. See **Quiet Title Act of 1972.**

GIFT TAXES. See **Internal Revenue Code, 1.**

GOVERNMENT EMPLOYEES. See **Certiorari; Constitutional Law, VI, 4, 5.**

HANDGUNS. See **Criminal Law, 2.**

HANDICAPPED INFANTS' HOSPITAL CARE. See **Rehabilitation Act of 1973.**

HUNTING RIGHTS OF INDIANS. See **Indians, 1.**

HYDROELECTRIC POWER RATES. See **Electric Power Rates.**

ILLEGITIMATE CHILD'S INHERITANCE FROM FATHER'S ESTATE. See **Constitutional Law, VI, 2.**

ILLINOIS. See **Jurisdiction.**

IMMUNITY OF INDIAN TRIBES FROM SUIT. See **Indians, 2.**

IMMUNITY OF UNITED STATES FROM SUIT. See **Quiet Title Act of 1972.**

IMPROVIDENT GRANT OF CERTIORARI. See **Certiorari.**

INCOME TAXES. See **Internal Revenue Code, 2.**

INDIANS. See also **Catawba Indian Tribe Division of Assets Act; Constitutional Law, VII; Quiet Title Act of 1972.**

1. *Hunting rights—Preservation of eagles.*—In a prosecution of respondent member of Yankton Sioux Tribe for violations of Bald Eagle Protection Act and Endangered Species Act by shooting bald eagles and a golden eagle without a Government permit, respondent could not assert defense that under an 1858 treaty he had right to hunt eagles within Yankton Reservation for noncommercial purposes and Acts in question did not abrogate such right. United States v. Dion, p. 734.

2. *Jurisdiction of Indian Tribe's claim—State's disclaimer statute—Preemption by federal law.*—Where petitioner Tribe brought suit in a North

INDIANS—Continued.
Dakota court against respondent for negligence and breach of contract in connection with a construction project on Tribe's reservation, suit was improperly dismissed under a state statute that, absent a tribe's waiver of sovereign immunity, disclaimed unconditional state-court civil jurisdiction that had been extended in such cases under an earlier state statute, since disclaimer statute was pre-empted by a federal statute which governed state assumption of jurisdiction over Indian country and which did not provide for disclaimers of jurisdiction. Three Affiliated Tribes v. Wold Engineering, p. 877.

INFANTS' HOSPITAL CARE. See **Rehabilitation Act of 1973.**

INSTRUCTIONS TO JURY. See **Stays.**

INSURED BANK DEPOSITS. See **Federal Deposit Insurance Corporation.**

INTERNAL REVENUE CODE.

1. *Gift and estate tax exemptions—Replacement by "unified credit"—Transitional rule.*—Where (1) prior to 1977, Code permitted a $30,000 lifetime gift tax exemption and a $60,000 estate tax exemption, (2) Tax Reform Act of 1976, which became effective on January 1, 1977, eliminated such exemptions and created a "unified credit" that taxpayer could apply to either gift tax or estate tax, and (3) 1976 Act also contained a "transitional rule" reducing unified credit as to a later-deceased taxpayer's gifts that had been made after September 8, 1976, Internal Revenue Service properly applied transitional rule to appellees' decedent's situation involving gifts made on September 28, 1976, and his death about two years later, and transitional rule, as so applied, did not violate due process principles. United States v. Hemme, p. 558.

2. *Income tax—Business expense—Slot machines—Liability for "progressive" jackpots.*—Respondent taxpayer, which operated slot machines at its casino that had "progressive" jackpots which, under state regulations, could not be reduced from indicated amount before being paid out, was entitled, under its accrual method of accounting, to claim as a business deduction for fiscal year accrued liability for progressive jackpots even though they had not yet been won by a patron. United States v. Hughes Properties, Inc., p. 593.

INTERROGATION OF ACCUSED BY POLICE. See **Criminal Law, 1.**

INTERSTATE COMMERCE. See **Constitutional Law, I; Electric Power Rates.**

INTOXICATING LIQUORS. See **Constitutional Law, I.**

JAILER'S TESTIMONY AT DEATH PENALTY HEARING. See **Constitutional Law, III.**

JOB-TRAINING PROGRAMS. See **Comprehensive Employment and Training Act.**

JUDICIAL REVIEW OF MEDICARE REGULATIONS. See **Social Security Act, 2.**

JURISDICTION. See also **Admiralty; Indians, 2.**

Abortion statute's validity—Dismissal of appeal.—Where (1) in District Court, appellee physicians successfully challenged constitutionality of provisions of Illinois abortion statute imposing criminal sanctions on physicians for violations of prescribed standards of care and requirements as to furnishing patient with particular abortion-related information, (2) appellant pediatrician was allowed to intervene as a party defendant based on his conscientious objection to abortions and his status as a pediatrician and a parent, and (3) Court of Appeals affirmed and State did not appeal but filed a "letter of interest" under this Court's Rule 10.4 stating that its interest was identical to that advanced by it in lower courts and was essentially coterminous with appellant's position, appeal was dismissed for want of jurisdiction because appellant lacked any judicially cognizable interest in Illinois statute and there was no longer any Article III "case" or "controversy" between appellees and State. Diamond v. Charles, p. 54.

JURY INSTRUCTIONS. See **Stays.**

JURY TRIALS. See **Constitutional Law, VI, 1; X.**

LABOR UNIONS. See **Certiorari; National Labor Relations Act.**

LETTERS OF CREDIT. See **Federal Deposit Insurance Corporation.**

LIMITATIONS PERIODS. See **Catawba Indian Tribe Division of Assets Act; Comprehensive Employment and Training Act; Quiet Title Act of 1972; Social Security Act, 1; Speedy Trial Act.**

LIQUOR REGULATIONS. See **Constitutional Law, I.**

LOANS TO FARMERS. See **Constitutional Law, V.**

MANUFACTURER'S LIABILITY FOR DEFECTIVE SHIPS' TURBINES. See **Admiralty.**

MEDICAL CARE FOR HANDICAPPED INFANTS. See **Rehabilitation Act of 1973.**

MEDICARE PROGRAM. See **Social Security Act, 2.**

MILITARY VETERANS' PREFERENCE IN PUBLIC EMPLOYMENT. See **Constitutional Law, VI, 5.**

MISUSE OF FEDERAL GRANTS. See **Comprehensive Employment and Training Act.**

MITIGATING CIRCUMSTANCES IN CONSIDERING DEATH PENALTY. See **Constitutional Law, III.**

MOTOR CARRIER ACT OF 1980. See **Antitrust Acts, 2.**

MOTOR CARRIER RATES. See **Antitrust Acts, 2.**

NATIONAL LABOR RELATIONS ACT.

State-court suit against union—Pre-emption by NLRA.—Where appellee, a former ship superintendent for a stevedoring company who apparently was discharged for attempting to organize superintendents, successfully sued appellant Union in state-court action alleging Union's fraud in assuring superintendents that it would get their jobs back if they were discharged for Union-related activities, proper standard for determining Union's claim that Act pre-empted state proceedings was whether appellee was arguably an employee, rather than a supervisor, so as to require National Labor Relations Board to initially decide pre-emption issue, and Union made no showing that appellee was an employee. Longshoremen v. Davis, p. 380.

NONINTERCOURSE ACT. See **Catawba Indian Tribe Division of Assets Act.**

NORTH CAROLINA. See **Electric Power Rates.**

NORTH DAKOTA. See **Indians, 2.**

PARENTAL CONSENT FOR INFANTS' HOSPITAL CARE. See **Rehabilitation Act of 1973.**

PARENT AND CHILD. See **Constitutional Law, VI, 2; Rehabilitation Act of 1973.**

PENNSYLVANIA. See **Constitutional Law, IX.**

PEREMPTORY CHALLENGE BASED ON JUROR'S RACE. See **Constitutional Law, VI, 1.**

PHYSICIANS' DUTIES AS TO ABORTIONS. See **Constitutional Law, IX.**

POISONS IN FOOD. See **Federal Food, Drug, and Cosmetic Act.**

POLICE INTERROGATION OF ACCUSED. See **Criminal Law, 1.**

PRE-EMPTION OF STATE LAW BY FEDERAL LAW. See **Communications Act of 1934; Electric Power Rates; Indians, 2; National Labor Relations Act.**

PRODUCTS-LIABILITY CLAIMS. See **Admiralty.**

PUBLIC EMPLOYEES. See **Certiorari; Constitutional Law, VI, 4, 5.**

QUIET TITLE ACT OF 1972.

Indian allotment lands—Action against Government—Limitations period.—Where (1) at respondent's request, Bureau of Indian Affairs, in 1967, provided her with a list of her inherited interests in Indian land allotments but did not include three allotments that Government, as trustee, had sold in 1954, (2) in response to a specific inquiry in 1981, Bureau informed her that such allotments had been sold, and (3) alleging that sale was void, she filed a federal-court suit against Government, action was one to adjudicate a disputed title to real property in which United States claimed an interest within meaning of Act, and was barred by Act's 12-year limitations period, which began to run at least by 1967. United States v. Mottaz, p. 834.

RACIAL DISCRIMINATION. See **Constitutional Law, VI, 1, 4; X, 2.**

RATES FOR ELECTRIC POWER. See **Electric Power Rates.**

RATES FOR INTRASTATE TELEPHONE SERVICE. See **Communications Act of 1934.**

RATES OF MOTOR CARRIERS. See **Antitrust Acts, 2.**

REED-BULWINKLE ACT. See **Antitrust Acts, 2.**

REHABILITATION ACT OF 1973.

Discrimination against handicapped infants—Hospital care—Validity of regulations.—Court of Appeals properly held that § 504 of Act, prohibiting discrimination against handicapped persons under any federally funded program, did not authorize Secretary of Health and Human Services' regulations providing, in effect, that federally funded hospitals could not withhold health care from infants on basis of their mental or physical impairments even when no parental consent for such care was given. Bowen v. American Hospital Assn., p. 610.

RELIGIOUS FREEDOM. See **Constitutional Law, VII.**

REMARRIAGE AS AFFECTING SOCIAL SECURITY SURVIVOR'S BENEFITS. See **Constitutional Law, VI, 3.**

RESIDENCY REQUIREMENT FOR VETERANS' PREFERENCE IN PUBLIC EMPLOYMENT. See **Constitutional Law, VI, 5.**

RESTRAINTS OF TRADE. See **Antitrust Acts, 1.**

RETROACTIVITY OF DECISIONS. See **Constitutional Law, VI, 2.**

RIGHT TO ABORTION. See **Constitutional Law, IX.**

RIGHT TO JURY TRIAL. See **Constitutional Law, X.**

RIGHT TO SPEEDY TRIAL. See **Speedy Trial Act.**

RIGHT TO TRAVEL. See **Constitutional Law, VI, 5.**

SCHOOLTEACHER LAYOFFS. See Constitutional Law, VI, 4.

SEARCHES AND SEIZURES. See Constitutional Law, XI.

SECRETARY OF LABOR'S RECOVERY OF MISUSED FEDERAL GRANTS. See Comprehensive Employment and Training Act.

SELECTION OF JURORS. See Constitutional Law, VI, 1; X.

SHERMAN ACT. See Antitrust Acts.

SHIPS' TURBINES. See Admiralty.

SIXTH AMENDMENT. See Constitutional Law, II; X; Criminal Law, 1.

SLOT MACHINE OPERATOR'S TAX LIABILITY. See Internal Revenue Code, 2.

SOCIAL SECURITY ACT. See also **Constitutional Law, VI, 3; VII.**

1. *Disability benefits—Validity of administrative procedure—Class action.*—Where federal-court class action was brought against federal officials to challenge internal policy relating to administrative procedure for terminating or determining eligibility for disability benefits under Act, District Court properly certified class to include (1) claimants who had not complied with Act's requirement that judicial review be sought within 60 days of Secretary of Health and Human Services' final decision, since 60-day requirement was a statute of limitations and was tolled while claimants, because of challenged internal policy, did not know of a violation of their rights, and (2) claimants who failed to exhaust their administrative remedies. Bowen v. City of New York, p. 467.

2. *Medicare program—Judicial review of regulations.*—Judicial review of federal regulations governing payment of benefits under Part B of Medicare program is not barred by Act's provisions (42 U. S. C. §§1395ff, 1395ii (1982 ed. and Supp. II)) relating to Part A of Medicare program and review of "amount determinations." Bowen v. Michigan Academy of Family Physicians, p. 667.

SOUTH CAROLINA. See Catawba Indian Tribe Division of Assets Act.

SPEEDY TRIAL ACT.

Limitations period—Delays from pretrial hearings.—Act's provision excluding from prescribed limitations period (requiring trial within 70 days of filing of an indictment or information, or of defendant's first appearance before a judge or magistrate) any delay resulting from other proceedings concerning defendant, excludes from 70-day limitation all time between filing of a pretrial motion and conclusion of hearing on that motion and any delay for additional filings from parties needed for motion's disposition, whether or not delay in holding such hearing is "reasonably necessary";

SPEEDY TRIAL ACT—Continued.

record established no violation of 70-day requirement with regard to petitioners' federal-court trial, which was delayed pending disposition of their pretrial motion to suppress evidence. Henderson v. United States, p. 321.

STANDBY LETTERS OF CREDIT. See **Federal Deposit Insurance Corporation.**

STANDING TO SUE. See **Jurisdiction.**

STATE COURTS' JURISDICTION OVER INDIAN TRIBES' SUITS. See **Indians, 2.**

STATUTES OF LIMITATIONS. See **Catawba Indian Tribe Division of Assets Act; Comprehensive Employment and Training Act; Quiet Title Act of 1972; Social Security Act, 1; Speedy Trial Act.**

STAYS.

Judgment invalidating death penalty.—California's application to stay enforcement of State Supreme Court's judgment invalidating respondent's death sentence for murder on grounds that failure to properly instruct jury on issue of intent to kill violated due process requirements and that such error was not harmless, is granted. California v. Hamilton (REHNQUIST, J., in chambers), p. 1301.

SUPREME COURT. See **Jurisdiction.**

SURVIVOR'S SOCIAL SECURITY BENEFITS. See **Constitutional Law, VI, 3.**

TAXES. See **Internal Revenue Code.**

TAX REFORM ACT OF 1976. See **Internal Revenue Code, 1.**

TELEPHONE RATES. See **Communications Act of 1934.**

TELEVISION FRANCHISES. See **Constitutional Law, VIII.**

TEXAS. See **Constitutional Law, VI, 2.**

TOLLING STATUTES OF LIMITATIONS. See **Social Security Act, 1.**

TRAVEL RIGHTS. See **Constitutional Law, VI, 5.**

TREBLE-DAMAGES ACTIONS. See **Antitrust Acts, 2.**

TUCKER ACT. See **Quiet Title Act of 1972.**

TURBINES FOR SHIPS. See **Admiralty.**

TWENTY-FIRST AMENDMENT. See **Constitutional Law, I.**

UNFAIR COMPETITION. See **Antitrust Acts, 1.**

UNIONS. See **Certiorari; National Labor Relations Act.**

UNITED STATES' IMMUNITY FROM SUIT. See Quiet Title Act of 1972.

UNLOADED HANDGUN AS "DANGEROUS WEAPON." See Criminal Law, 2.

VETERANS' PREFERENCE IN PUBLIC EMPLOYMENT. See Constitutional Law, VI, 5.

WEAPONS. See Criminal Law, 2.

WHOLESALE LIQUOR PRICES. See Constitutional Law, I.

WITNESSES. See Constitutional Law, II; Criminal Law, 1.

WORDS AND PHRASES.

1. *"Dangerous weapon."* 18 U. S. C. § 2113(d). McLaughlin v. United States, p. 16.

2. *"Deposit."* 12 U. S. C. § 1813(*l*)(1). FDIC v. Philadelphia Gear Corp., p. 426.

X-RAY POLICY OF DENTISTS' ORGANIZATION. See Antitrust Acts, 1.